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MASSACHUSETTS REPORTS

186

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

MAY 1904 — NOVEMBER 1904

HENRY WALTON SWIFT

REPORTER

BOSTON
LITTLE, BROWN, AND COMPANY
1905

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. MARCUS PERRIN KNOWLTON, CHIEF JUSTICE.

HON. JAMES MADISON MORTON.

HON. JOHN LATHROP.

HON. JAMES MADISON BARKER.

HON. JOHN WILKES HAMMOND.

HON. WILLIAM CALEB LORING.

HON. HENRY KING BRALEY.

ATTORNEY GENERAL.

HON. HERBERT PARKER.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

CATHERINE McCARTY & others *vs.* JANE PATTERSON & others.

Suffolk. January 11, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Partition. Jurisdiction. Receiver.

Under Pub. Sts. c. 178, § 64, (R. L. c. 184, § 46,) providing that when proceedings for partition are lawfully commenced in either the Probate Court or the Superior Court "the court in which they are so commenced shall retain jurisdiction of the case, saving the right of appeal in all cases where an appeal is allowed by law", if a petition for partition in the Probate Court is dismissed without prejudice at the request of the petitioners and no appeal is taken within the time required by law, the petitioners have a right to file a new petition in the Superior Court.

On a petition for partition of real estate belonging to the heirs of an estate not yet settled there is no occasion for the appointment of a receiver. Whether in such a case the court has power to appoint a receiver even with the assent of all the parties, *quære*.

On a petition for partition the right of the petitioners to have a partition made is not affected by an error of the trial judge in appointing a receiver without power to do so, nor by the fact that there are attachments upon the shares of some of the petitioners.

PETITION, filed in the Superior Court for the county of Suffolk on July 29, 1901, under Pub. Sts. c. 178, for partition of

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certain real estate in Boston which belonged to Jane Nugent at the time of her death.

In the Superior Court the case was heard by *Schofield*, J., who found that the petitioners were entitled to a partition. He made an interlocutory order for a partition and ordered that the partition be made by a sale at public auction. The respondents Jane Patterson, Charles B. Woolley and Frank Nugent appealed.

As the appeals from the interlocutory orders might affect the price bid at the auction, and might, if sustained, invalidate the sale of the property ordered by him, the judge was of opinion that the validity of such orders ought to be determined by this court before any further proceedings in the Superior Court, and with the consent of counsel on both sides reported the case for such determination. If the orders and decrees appealed from were right, they were to stand and the sale was to be made by the commissioner in accordance with the order of the Superior Court; otherwise, they were to be set aside, and such order or decree was to be entered as justice and equity might require.

T. F. Meehan, for the respondents.

W. Keyes, for the petitioners.

LATHROP, J. This is a petition to the Superior Court, filed July 29, 1901, for the partition of certain parcels of land in Boston, by eight of the ten heirs at law of Jane Nugent, deceased. The respondents are the other two heirs at law and certain creditors. The principal defence appears to be that on June 10, 1901, a petition was filed in the Probate Court for partition, and this petition, after a hearing, was dismissed, at the request of the petitioners, without prejudice, and a decree was entered accordingly. No appeal was taken from this decree. The Probate Court had jurisdiction of this petition, Pub. Sts. c. 178, §§ 45, 48, whether the estate had been settled or was in course of settlement. But this jurisdiction was concurrent with that of the Superior Court, by § 45.

The contention of the respondents is that, as it is provided by the Pub. Sts. c. 178, § 64: "When proceedings for obtaining partition are lawfully commenced in either of the courts men-

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tioned in this chapter, the court in which they are so commenced shall retain jurisdiction of the case, saving the right of appeal in all cases where an appeal is allowed by law," the Probate Court still has jurisdiction, and the Superior Court had no authority to entertain the present petition. But when the petition was dismissed in the Probate Court, and no appeal was taken within the time required by law, the petitioners had a right to apply to the Superior Court.

The remaining objection of the respondents is that the Superior Court had no power to appoint a receiver. The facts in regard to this are that on October 8, 1901, the cause was continued *nisi*, and on April 13, 1903, this order was vacated, and the case heard. The judge found that the petitioners were entitled to have partition made; that it was practically impossible to set off to each owner his share by metes and bounds, and ordered a partition by sale at public auction. An interlocutory order to this effect was made on October 17, 1903. The judge had previously, on August 28, 1901, appointed a receiver to collect the rents and profits of the estate from the tenants in possession.

The appointment of the receiver and the delay in the case were probably caused by the supposition that partition could not be had until the estate was settled. But three months before the order appointing the receiver was made, this court had decided that a partition might be made before the estate was settled. *O'Brien* v. *Mahoney*, 179 Mass. 200. There was therefore no occasion for the appointment of a receiver; and it may well be doubted whether the judge had any power to appoint a receiver, even with the assent of all the parties.

In *Blood* v. *Blood*, 110 Mass. 545, it was said by Mr. Justice Gray: "It is of the very essence of a tenancy in common, that the tenants have each and equally the right to occupy the property and take the profits." In this case the court refused to entertain a bill in equity, between two tenants in common, praying for an injunction and for the appointment of a receiver. See also *Husband* v. *Aldrich*, 135 Mass. 317.

If, however, the judge below erred in this respect, we are of opinion that this does not in any way affect the right of the petitioners to have a partition made.

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Nor does the fact that there are attachments upon the shares of some of the petitioners in suits now pending, affect the rights of the petitioners to a partition.

Decree for partition affirmed.

ALEXANDER BURNSIDE *vs.* CITY OF EVERETT.

Middlesex. January 12, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Municipal Corporations. *Evidence*, Collateral issues. *Witness*, Cross-examination, Questions to expert. *Practice*, *Civil*, Exceptions.

In an action against a city for alleged negligence in improperly maintaining the gate at the end of an overflow pipe, so that after a heavy rainfall there was an overflow from a sewer through a connecting drain into the plaintiff's cellar, the plaintiff offered to prove that there had been an overflow two years before the one in question with the same system of sewerage, for the purpose of showing notice to the defendant that such an accident was likely to happen. The presiding judge excluded the evidence. *Held*, that the exclusion of this evidence as too remote was within the discretion of the presiding judge.

The extent to which a witness may be cross-examined as to collateral matters for the purpose of testing his accuracy and understanding is largely within the discretion of the presiding judge. In this case that discretion was exercised rightly.

While a purely hypothetical question to an expert may be better in form, yet, if there is no dispute about the facts, a witness may be asked to state his opinion on the assumption that the evidence is true.

In an action against a city for alleged negligence in improperly maintaining the gate at the end of an overflow pipe, so that after a heavy rainfall there was an overflow from a sewer through a connecting drain into the plaintiff's cellar, the defendant asked its engineer the following question: "Assuming the rainfall to be in the nature as testified to by Mr. S., and as former witnesses testified, and assuming the gate in the Metropolitan to be closed, if the tidal gate in the overflow was closed at that time, what, in your opinion, would happen to the system?" The witness answered that the sewer would overflow, as in his opinion it was not of sufficient capacity to carry off such an amount of rain water. There appeared to have been no conflicting evidence on the question of the nature of the rainfall. *Held*, that there was no error in allowing the question to be put to the engineer in this form.

The refusal of a presiding judge to allow a witness for the plaintiff on rebuttal to contradict certain evidence for the defendant, on the ground that the testimony should have been put in as part of the plaintiff's case, is not a matter of exception, being within the discretion of the presiding judge.

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LATHROP, J. This is an action of tort against a city for injuries caused by the overflow of a sewer through a connecting drain into the plaintiff's cellar. At the trial in the Superior Court, the jury returned a verdict for the defendant; and the only exceptions relate to questions of evidence.

It appeared in evidence that the injury was done on the night of February 28, 1902, when there was a very heavy rainfall, lasting four hours, amounting to seventy-eight one hundredths of an inch per hour; that the sewer connected with the metropolitan sewer, and had an overflow pipe twenty-four inches in diameter and fifty feet long, at the end of which was a gate which opened into Island End River; that at the end of this pipe was a gate hung on hinges, which kept the tide out when high, and let the sewage out when the tide was low; that the tide was low at the time of the storm; and that the hinges of the gate were apt to become rusty and not work freely. It further appeared that the gate was inspected from time to time and filed and oiled.

1. The first exception relates to the exclusion of an offer of proof, on cross-examination of one Doyle, a foreman of the Everett sewer department, and who had charge of inspecting the gates of the overflow pipes. The plaintiff offered to prove by this witness that there had been an overflow two years before the one in question, with the same system of sewerage, for the purpose of proving notice to the defendant that such an accident was apt to happen, and also for the purpose of testing the witness on cross-examination.

We are of opinion that the evidence was not admissible on either ground. A city is liable for not keeping its sewer in order, provided there is no want of due care on the part of the plaintiff, as in *Stead* v. *Worcester*, 150 Mass. 241, *Child* v. *Boston*, 4 Allen, 41. The gist of the action is negligence. There could have been no difficulty in this case in showing the condition of the sewer and of the gate when the damage was done; and the judge, in the exercise of his discretion, might well have excluded evidence of what happened two years before, on the ground that it was too remote. See *Gilbert* v. *West End Street Railway*, 160 Mass. 403. The evidence offered was as to a collateral fact which would furnish no legal presumption as to the facts in dis-

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pute, and which the defendant was not bound to be prepared to meet. *Collins* v. *Dorchester*, 6 Cush. 396. *Marvin* v. *New Bedford*, 158 Mass. 464, 467.

The extent to which a witness may be questioned on cross-examination, as to collateral matters for the purpose of testing his accuracy, his understanding, etc., must rest largely in the discretion of the presiding judge. In the present case we see no error of law in excluding the evidence.

2. The second exception relates to the following question put by the defendant to one Harrison, the city engineer of the defendant: "Assuming the rainfall to be in the nature as testified to by Mr. Smith, and as former witnesses testified, and assuming the gate in the Metropolitan to be closed, if the tidal gate in the overflow was closed at that time, what, in your opinion, would happen to the system?" The witness answered that the sewer would overflow, as in his opinion it was not of sufficient capacity to carry off such an amount of rain water.

While a purely hypothetical question to an expert may be better in form, *Woodbury* v. *Obear*, 7 Gray, 467, yet this form is not the only one recognized in our decisions. *Hunt* v. *Lowell Gas Light Co.* 8 Allen, 169, 172. *Rafferty* v. *Nawn*, 182 Mass. 503. Generally, if there is a dispute about the facts, a witness cannot be asked to state his opinion on the assumption that the evidence is true. *Chalmers* v. *Whitmore Manuf. Co.* 164 Mass. 532. *McCarthy* v. *Boston Duck Co.* 165 Mass. 165. *Oliver* v. *North End Street Railway*, 170 Mass. 222, 223. In the first of these cases it is said by Mr. Justice Knowlton: "In determining whether a question is so framed as to bring to the aid of the jury matters purely of expert opinion in such form as to be intelligible, something must be left to the presiding judge, who often has before him facts which cannot well be presented in writing to an appellate tribunal, and whose finding upon any doubtful question of fact cannot be revised by this court." The same rule was stated in the two cases last above cited.

In the case before us we find nothing in the bill of exceptions which shows any conflicting evidence on the question of the nature of the rainfall, which is the only part of the question that can be objected to; and we see no error of law in admitting the question in the form in which it was put.

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3. The third exception relates to the refusal of the judge to allow one Hodgson, in rebuttal, to contradict the testimony of Harrison given above, on the ground that the testimony should have been put in as part of the plaintiff's case. We are of opinion that no error of law appears. This was a matter clearly within the discretion of the judge, and not a matter of exception. *Martin* v. *Maguire*, 7 Gray, 177. *Corey* v. *Janes*, 15 Gray, 543. *Eames* v. *Whittaker*, 123 Mass. 342. *Howes* v. *Colburn*, 165 Mass. 385, 388. *Lansky* v. *West End Street Railway*, 173 Mass. 20.

Exceptions overruled.

M. S. Holbrook, (*M. Holbrook* with him,) for the plaintiff.

W. S. Thompson, for the defendant.

JOHN J. CADIGAN *vs.* LOTTA M. CRABTREE.

Suffolk. January 13, 14, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Agency. Broker.

If the owner of real estate employs a broker to lease it on terms to be approved by the owner, and the broker procures an offer which the owner rejects, and thereupon the owner in good faith revokes the authority of the broker and ceases to employ him, if the owner afterwards honestly changes his mind and leases the real estate to the tenant originally procured by the broker, the broker is entitled to no compensation for the lease made after the termination of his employment.

CONTRACT to recover a commission for services as a real estate broker. Writ dated July 29, 1899.

The case was before this court at a previous stage as reported in 179 Mass. 474, where the pleadings and the evidence presented at the first trial before *Morton*, J. are described. The defendant's exceptions having been sustained by that decision, there was a new trial before *Loring*, J., who made the rulings stated in the opinion of the court. The jury by direction of the justice returned a verdict for the defendant on the third count. On the fourth count the jury returned a verdict for the plaintiff in the sum of $3,257.37; and the defendant alleged exceptions.

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F. Paul, for the defendant.

S. L. Whipple & W. R. Sears, for the plaintiff.

HAMMOND, J. This is an action by a real estate broker to recover a commission upon a lease. So far as material to the question before us, the evidence for the plaintiff, taken in the light most favorable to him, tended to show the following facts: About November 1, 1898, the defendant employed the plaintiff to procure a tenant for certain real estate owned by her. He saw several persons on the matter, among whom were one Gould and one Mann. With the latter negotiations were soon begun which finally resulted in an agreement as to terms, and in the preparation of some papers. The Mann lease, however, "fell through" on December 20, 1898, because the person who was to become the surety for the tenant changed his mind and withdrew. Directly after this the plaintiff renewed his negotiations with Gould, and within a day or two told the defendant that he thought he could get a good tenant, mentioning Gould, whom he said he would "see right away," and she said to him "All right, go ahead." On December 22, the plaintiff had an interview with Gould and Pollo, who were acting together, showed them certain plans, told them what the terms of the Mann lease were, and said that those were the only terms on which the property could be hired. They said they would think it over. The plaintiff reported this interview to Gilman, the general agent of the defendant, who said he would see what could be done. In two or three days Gilman said he could not get the defendant to decide to do anything at that time. On the first or second of January, the defendant and the plaintiff, according to his testimony, had an interview in which the plaintiff told the defendant about his talks with Gould and that the latter was satisfied with the terms of the Mann lease. The defendant said in substance that she had decided not to lease but to sell. "She would not talk lease at all." The plaintiff did not see the defendant again. He wrote to her two or three times between January 2 and February 8, the substance of the letters being that he could not sell the property for the price named by her, and that she had better lease it, mentioning Gould and Pollo. She replied on February 8 that the property was "for sale only." Meanwhile the plaintiff saw Gould and Pollo "every

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little while" and talked with them about the defendant. By letter dated March 3, the defendant informed the plaintiff that she had withdrawn the property from the market for sale, had decided to lease it and had placed it in the hands of one Fitzpatrick as her sole agent, who alone had authority to negotiate for her. Up to the time the plaintiff received this letter of March 3, he never had heard that any other broker was having anything to do with the business of leasing the property, and during this whole time he was ready and willing to act as a broker in carrying on negotiations for the lease to Gould and Pollo. Neither Gould nor Pollo, acting together or separately, ever agreed with the plaintiff to take the lease, nor did either of them authorize the plaintiff to convey to the defendant an offer. The negotiations never reached that point. On December 28 or 29, the plaintiff, at the order of the defendant acting through Gilman, took down his sign from the estate.

On December 20, 1898, the day the negotiations for the Mann lease ended, the defendant met Fitzpatrick, a real estate broker, mentioned above, who also had been talking with Gould for several months about hiring the property. In this interview Fitzpatrick spoke of Gould and Pollo as persons who would be good tenants, and asked the defendant to give them a lease, but she declined to consider the question of leasing the property, and she continued in this frame of mind until March 3, when, after discussion with Fitzpatrick as to whether to sell or lease, she finally again changed her mind and placed the property in his hands as her sole agent to lease. This was her first employment of Fitzpatrick. On March 12 she saw Gould for the first time, and on March 16 the lease was made to him and Pollo. It was not contended by the plaintiff that the defendant, in deciding not to lease, acted in bad faith. It is to be noted also that the testimony was conflicting as to whether the plaintiff had the interview with the defendant between December 20 and January 2, as to which he testified. The defendant testified that no such interview took place, and that after the conclusion of the negotiations as to the Mann lease on December 20 she did not see or have any communication with the plaintiff until the interview in January. The jury might have believed the plaintiff, however, and we have assumed that they did.

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The case was tried upon the third and fourth counts of the declaration. At the close of the evidence the justice ordered a verdict for the defendant on the third count. As to the fourth count the justice ruled that the jury would not be warranted in finding for the plaintiff upon the ground "that the plaintiff was the predominating, efficient cause of the lease given by the defendant to Gould & Pollo and that his services brought about the making of that lease." The justice further ruled that the terms of the Mann lease, so called, "were not substantially the same as the terms of the lease . . . to Gould & Pollo, and that the action could not be maintained upon the fourth count, in so far as a finding for the plaintiff involved a finding that said leases were substantially alike in their terms." The justice, however, declined to rule as requested by the defendant that the action could not be maintained upon this count, and then submitted the case to the jury, upon instructions to which no exceptions were taken.

The question is whether the justice erred in refusing to order a verdict for the defendant upon the fourth count. The principle upon which the case was submitted to the jury was stated by the justice in the following language: "If the owner of property employs a broker to find a customer for him, and the broker introduces to the principal a person who he says is willing to negotiate, and if the principal and the customer enter into negotiations, and while these negotiations are going on they are suspended, or for the time, at any rate, ended by the principal and not by the customer, and afterwards the principal should close the trade with that customer, the broker is entitled to his commission. I say 'if afterwards the principal should close the trade with that customer,' and I say 'if the negotiations are ended or suspended by the principal and not by the customer.' It is not enough that the broker gives the names of John Smith or Henry Jones, and afterwards the principal should, through the negotiations of another broker, close a trade with John Smith or Henry Jones; the broker cannot entitle himself to a commission by simply having given the name of John Smith or Henry Jones; if he does not do anything more than that he is not entitled to a commission; even if he names them as customers, if he reports that to his principal it is not enough; the

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matter has got to go further. It must result in negotiations between the customer and the principal, after the customer has been introduced by the broker. If negotiations begin, and, before they have resulted in a refusal by the principal of the customer's terms, they are suspended merely, and are subsequently resumed, — I am putting a case where the negotiations are begun and are suspended by the principal without having come to a definite conclusion, because they cannot trade at that time, and afterwards the principal trades with that customer, — a commission is due the broker. If, however, the negotiations are ended by the customer making an offer which is refused, then that ends that introduction so far as the question of a broker's commission is concerned. For instance, in this case, you will remember that in November, Mr. Cadigan brought an offer. It was stated by Mr. Gould that he would not give any more than a sum then named, and that this statement was not a definite offer, but Mr. Cadigan brought it as an offer to the defendant; I think it was $25,000 a year and the owner to make all the repairs. Miss Crabtree refused definitely to take that offer. That ended that as a transaction in which Gould & Pollo were Cadigan's customers. If the transaction stopped there and nothing more happened, and then, later, Miss Crabtree made a trade, that would not entitle the plaintiff to a commission."

Having thus stated and illustrated this principle, the justice proceeded to state that "the question of efficient cause has nothing to do with" the case; and, after having called the attention of the jury to the conflict of evidence, to which reference has hereinbefore been made, as to whether, after the Mann lease fell through, there was any interview between the defendant and the plaintiff in which she told him to go ahead with his attempts to procure a tenant, finally left the case to the jury in this concrete form: "If, after the Mann lease fell through, negotiations were in fact begun, with the defendant's knowledge and approval, by Mr. Cadigan, and if the negotiations went so far that they could be really said to be negotiations, and if after the naming of a customer they were suspended by the defendant and she afterward made a trade with that same customer with whom the plaintiff had talked, then you will find for the plaintiff. If you find that negotiations went on and the defendant

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did not know of them, or if you find that the negotiations did not go on at all, you will find for the defendant; but if you find that they did go on with the defendant's knowledge and approval, you will find for the plaintiff."

The evidence clearly shows that, even if after the Mann lease fell through the defendant still employed the plaintiff as a broker to effect a lease, the authority was revoked on January 2. Both parties testify to this, and the plaintiff does not contend that thereafterwards he was ever given authority to act in the matter. The authority was revoked because the defendant really and in good faith had abandoned her intention to lease, and she notified the plaintiff of that fact. While the plaintiff was acting under her authority he had not effected a lease. More than two months elapsed after the revocation of the plaintiff's authority before one was effected. It is also to be noted that there was no proof of any usage or custom.

The jury therefore were allowed to find for the plaintiff under the conditions stated in the last paragraph of the charge, even if the termination of the employment of the plaintiff and of the negotiations was caused by the defendant's *bona fide* change in her intention, and also irrespective of the question whether he was the efficient cause of the lease, and in the absence of any usage or custom.

We think that the proposition as thus laid down is too broad. The relation between the defendant and the plaintiff was primarily that of principal and agent, and, as has been decided in this very case as reported in 179 Mass. 474, the defendant had the right to discharge the plaintiff at any time. When the defendant applied to the plaintiff to secure his services, she did not bind herself to give him even a reasonable time within which to procure a tenant, *Cadigan* v. *Crabtree, ubi supra;* much less did she bind herself that she would not change her mind as to the use or disposition of her property. In deciding not to lease and in discharging him for that reason, she violated no right of the plaintiff. Under the general laws of agency, his rights were fixed at the time of his discharge, provided she acted in good faith. At that time the plaintiff's efforts had been unavailing and he had not earned his commission. He did not earn it by anything he did afterwards. It is not even shown that under the

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doctrine of efficient cause, as this term is understood when used in this connection, he earned a commission. His right to work for a commission, as well as his right to impose any obligation upon the defendant by reason of holding himself ready to proceed as her agent, ended upon his discharge, she acting in good faith. Such a view is sustained by the general law of agency, and, in the absence of proof of any custom or usage to the contrary, must be applicable to this form of agency. And on principle this must be so no matter what may be the stage of the negotiations, from the simple introduction of the customer to the nearly completed ending, provided always that the broker has not succeeded in securing the customer ready and willing to accede to the terms of the principal. As applicable to this case we adopt the following statement of the principle as found in *Sibbald* v. *Bethlehem Iron Co.* 83 N. Y. 378: "If, in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker, with the view of concluding the bargain without his aid, and avoiding the payment of commissions about to be earned, it might well be said that the due performance of his obligation by the broker was purposely prevented by the principal. But if the latter acts in good faith; not seeking to escape the payment of commissions, but moved fairly by a view of his own interest; he has the absolute right before a bargain is made while negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority, and the latter cannot thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully negotiated, and even though, to some extent, the seller might justly be said to have availed himself of the fruits of the broker's labor."

This case is to be distinguished from those cases in which the relation of agency has not been terminated, as well as from those where it has been terminated in bad faith. The case is also to be distinguished from those in which there is proof of a custom or usage, as in *Loud* v. *Hall*, 106 Mass. 404. On principle, then, the proposition upon which the case was submitted, as above stated, is too broad. The authorities also seem to be against it. See, as bearing upon the question, *Leonard* v.

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Eldridge, 184 Mass. 594; *Bailey* v. *Smith*, 103 Ala. 641; *Fairchild* v. *Cunningham*, 84 Minn. 521; *Wylie* v. *Marine National Bank*, 61 N. Y. 415; *Sibbald* v. *Bethlehem Iron Co.* 83 N. Y. 378; *Alden* v. *Earle*, 24 Jones & Spen. 366; *Gillett* v. *Corum*, 5 Kans. 608; *Livezy* v. *Miller*, 61 Md. 337; *Stedman* v. *Richardson*, 100 Ky. 79; *Earp* v. *Cummins*, 54 Penn. St. 394 (cited by Gray, C. J. in *Ward* v. *Fletcher*, 124 Mass. 224); *Uphoff* v. *Ulrich*, 2 Ill. App. 399; *Abbott* v. *Hunt*, 129 N. C. 403. See also, *contra*, *Gottschalk* v. *Jennings*, 1 La. Ann. 5, which seems to be in conflict with the general weight of authority.

We are of opinion that the jury should have been instructed, as requested by the defendant, that upon all the evidence the jury would not be warranted in returning a verdict for the plaintiff upon the fourth count.

Exceptions sustained.

NATHAN MATTHEWS, JR., administrator, *vs.* V. MABEL THOMPSON & others.

HENRY THOMPSON & others *vs.* SAME.

Suffolk. January 22, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Trust, Termination. *Dower*. *Fraud*, As against creditors. *Widow*.

T. being indebted to two sisters and a brother, to secure this indebtedness, caused certain real estate to be conveyed to E. by a deed absolute in form, E. executing a declaration of trust for the benefit of T's sisters and brother which was not acknowledged or recorded. Later at T's request T's sisters and brother executed a writing addressed to E. requesting him to convey the real estate to T. Whereupon E. conveyed the real estate to T. who treated it as his own. *Held*, that the trust was terminated, and that the deed from E. with the previous request in writing signed by the beneficiaries passed to T. a title which was free from equities.

Where mortgaged real estate is conveyed to secure certain indebtedness and the grantee executes a declaration of trust, in which the property thus held as security is declared to be subject to the prior mortgages and the payment of the debts to the mortgagees, this does not make the prior mortgagees *cestuis que trust* under the declaration, and their consent is not required to terminate the trust.

Where a conveyance by a husband through a third person to his wife as trustee is void as in fraud of creditors, and the wife without consideration has executed

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the deed in release of dower, if the conveyance is set aside as fraudulent the release falls with it and the wife regains her dower right.

Where a husband through a third person conveys to his wife in trust certain real estate which is substantially all of his property, both husband and wife knowing that the husband is insolvent, and the effect of the conveyance is to put the property beyond the reach of the grantor's creditors, the transaction however free from moral turpitude is fraudulent as against creditors.

Under Pub. Sts. c. 127, § 20, (R. L. c. 185, § 18,) where a widow has not waived the provisions made for her in her husban l's will she cannot have dower set out to her unless it appears by the will that the provisions were in addition to her dower.

TWO BILLS IN EQUITY filed respectively November 19, 1900, and August 6, 1900, one by Nathan Matthews, Jr., administrator with the will annexed of the insolvent estate of Edward Thompson, seeking to set aside, as fraudulent and void as against the creditors of that estate, a conveyance of certain land on Huntington Avenue, made by Edward Thompson through a third person to the defendant V. Mabel Thompson, or, in the alternative, to have the defendant V. Mabel Thompson declared a trustee for the benefit of the plaintiff as administrator; the other by Henry Thompson, Elizabeth B. Thompson and Frances M. Thompson, the brother and sisters of Edward Thompson, seeking to establish a trust in the land for their benefit.

The cases were heard together by *Barker*, J., who reported them for determination by the full court, such decrees to be entered as justice and equity might require.

The material portion of the will of Edward Thompson, held to cut off his widow's right of dower on its acceptance by her, was as follows:

"1st. I direct that all my just debts be paid.

"2d. I give and bequeath all my real and personal estate except as hereafter provided to the Boston Safe Deposit and Trust Company as Trustees, to be held by them for the following purposes.

"3d. I direct said Trustees to pay the income derived from my real and personal estate as above, in the following manner, viz: to my wife, V. Mabel Thompson during her life one-third of the income derived from said estate; to my daughter Mary E. Thompson during her life one-third of the income from said estate.

"4th. I also direct that one-third of the income derived from

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said estate shall be held by said Trustees for the benefit of my daughter, Maud V. Thompson, to be paid by said Trustees in the following manner: a sum not exceeding such an amount as may be deemed expedient by the said Trustees for her necessary living expenses, together with any expenses for educational purposes until she arrives at the age of twenty-two when she is to receive the income in the same manner as provided for my wife and daughter, Mary E. Thompson.

"5th. In the event of the decease of my wife or either of my daughters their third of said estate shall be added to the principal and the income derived to be paid to the survivor or survivors of my said wife and two daughters.

"6th. Upon the decease of my wife and two daughters the income from said estate to be divided in such a manner as to give each of my children or their issue an equal amount. Upon the death of all my children the estate to be divided in accordance with the laws of the Commonwealth of Massachusetts."

The remaining portion of the will disposed of articles of personal and household use.

R. Spring, (*R. S. Warner* with him,) for the plaintiff in the first case.

C. E. Shattuck, (*F. M. Ives* with him,) for the plaintiffs in the second case.

G. W. Anderson, for the defendants V. Mabel Thompson and Maud V. Thompson.

KNOWLTON, C. J. Edward Thompson, the testator of the plaintiff in the first suit, became indebted from time to time in a considerable sum to his unmarried sisters, Elizabeth B. Thompson and Frances M. Thompson, who were old ladies unfamiliar with business. Of his own motion, he made to them, as security, a mortgage of the real estate in question, subject to other mortgages which together amounted to about $37,000, and afterwards he caused them to foreclose this mortgage. A conveyance of the property, subject to the prior mortgages, was made to his son, who held it as agent of these sisters of the testator. Subsequently the testator caused his son to convey the property to the testator's nephew, one Eldridge, who executed a declaration of trust for the benefit of the old ladies, to secure them for their previous mortgage debts, and also for the benefit of their brother,

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Henry Thompson, to secure him for any advancements that he might make to Edward Thompson, and any other claims that he might hold against Edward. The declaration of trust also provided that after the payment of these debts the trustee should pay the balance, if any, to Edward Thompson. This declaration was not acknowledged nor recorded. It was understood that Edward Thompson was to have the entire management of the property, and these arrangements for security were made at his suggestion. At the end of about a year and a half, at his request, a paper was signed by the beneficiaries and sent to Eldridge, as follows:

"September 16, 1896.

Mr. William T. Eldridge,

Dear Sir, — We hereby request and authorize you to convey to Edward Thompson the real estate in Boston conveyed to you by Frederick P. Thompson.

Henry Thompson
Elizabeth B. Thompson
Frances Mary Thompson."

The testator enclosed this paper to Eldridge and asked him for a conveyance of the real estate. Thereupon, on October 6, 1896, Eldridge conveyed the land to Edward Thompson by a deed which was duly recorded, and which contained no reference to a trust. The deed was in the form of an ordinary quitclaim, purporting to be for a consideration of $1 paid by Edward Thompson, not describing him as trustee, and it contained a warranty that the premises were free from all incumbrances made or suffered by Eldridge, and a warranty against the lawful claims and demands of all persons claiming by, through or under him. This deed was delivered by Eldridge to Edward Thompson and was duly recorded. After this conveyance Edward Thompson held the land as if it were his own, mortgaged it several times for his own debts, had repeated negotiations for the sale of it, and treated it in all respects as if he were the absolute owner of it. The first question in the cases is whether he held it charged with a trust in favor of his brother and sisters, so that it still remains subject to this trust in the hands of his widow, to whom it was afterwards conveyed in his lifetime.

In reference to the transfer from Eldridge to the intestate,

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the presiding justice found "as a fact that the intention of all parties interested, including that of the retiring trustee, Mr. Eldridge, was not that Mr. Edward Thompson should hold as trustee." He found, "that the intention of his brother and sisters and of the retiring trustee was that the title should go back to him, Edward Thompson, and that the brother and sisters relied upon his saying what he would do in regard to their debts, not because he was a trustee, but because he was their brother and they were willing to trust him."

As all the parties were of full age, and as the trust was created by an arrangement to which the trustee and the *cestuis que trust* were the only parties, there is no doubt that they could terminate it at any time. *Smith* v. *Harrington*, 4 Allen, 566. *South Scituate Savings Bank* v. *Ross*, 11 Allen, 442. *Sears* v. *Choate*, 146 Mass. 395. *Brown* v. *Cowell*, 116 Mass. 461. Upon the findings of the judge, it is plain that they undertook to terminate it and supposed that they had terminated it. The plaintiffs in the second suit, the former *cestuis que trust*, rely upon the Pub. Sts. c. 120, § 3, (R. L. c. 127, § 3,) which provides that "No estate or interest in land shall be assigned, granted, or surrendered unless by such writing [an instrument in writing signed by the grantor or by his attorney] or by operation of law." The kind of instrument in writing required under this section depends upon the nature of the interest to be assigned or surrendered. In the present case, not only the legal estate, but by the record title an absolute estate in fee, including equitable interests as well as legal, was in Eldridge. This title was affected only by an unacknowledged and unrecorded paper. By his deed to Edward Thompson, Eldridge assigned and conveyed, according to the record, a perfect title subject to prior mortgages. This deed was an instrument in writing. The only additional instrument required by the statute was a writing which would relieve the grantor from the consequences of what would have been a breach of trust if he had acted without authority from the *cestuis que trust*. Nothing more was needed to pass a title which was free from equities. As applied to conditions like the present, we are of opinion that the assignment of the equitable rights of the plaintiffs in the second suit, made by a deed of one who held of record a perfect title and who acted under their authority given

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in writing, was a compliance with the statute. If we consider it as a surrender of equitable rights, we are of opinion that the paper which they signed was all the instrument required by the statute, it being given as an authority to be acted upon, and which was in fact acted upon, by the trustee who held of record an absolute title. The principle is analogous to that which has been applied to the surrender and cancellation of an unrecorded deed of defeasance, given in connection with an absolute deed to constitute a mortgage. When this is done in good faith, and is subsequently acted upon by the person to whom the surrender is made, the original holder is estopped from setting up the surrendered instrument against the existing title. *Trull* v. *Skinner*, 17 Pick. 213. *Falis* v. *Conway Ins. Co.* 7 Allen, 46, 49. See also as to parol waiver by *cestuis que trust* under the statute of frauds, *Kline's appeal*, 39 Penn. St. 463; *Miller* v. *Pierce*, 104 N. C. 389; *Gorrell* v. *Alspaugh*, 120 N. C. 362, 368. The action of the parties, taken in good faith, makes it impossible in equity for the *cestuis que trust* to hold the trustee for a violation of his duty in making the conveyance, or to charge the conscience of the grantee having knowledge of the previous trust, with a duty to hold subject to the trust.

The suggestion that the trust could not be discharged without the action of the prior mortgagees is not well founded. They are not *cestuis que trust* under the declaration, but the reference to the mortgagees and the payment of their debts is only a recognition of the prior incumbrances subject to which the trust must be executed, and the payment of which would be a necessary preliminary to the payments to the sisters and brother.

We are of opinion that Edward Thompson took the property discharged from the trust, and that the second bill must be dismissed.

The second question in the first case is whether the conveyance from Edward Thompson to his wife as a trustee is fraudulent as against his creditors. There was no valuable consideration for the deed. There is nothing to indicate that his wife's release of dower was made as a consideration for anything that she was to receive or that he was to give. It did not enter into the transaction as a contractual element, but it was like the ordinary release of dower by a wife as an incident to a contract between

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others, to which she was not a party. If such a conveyance is set aside as fraudulent, the release falls with it, and the wife regains her right of dower. *Stinson* v. *Sumner*, 9 Mass. 143. *Robinson* v. *Bates*, 3 Met. 40. *Walker* v. *Walker*, 101 Mass. 169.

The mere fact that a conveyance is voluntary, especially if it is founded on a consideration of love and affection, as in the case of a gift from a husband to his wife, or from a parent to his child, does not necessarily render it fraudulent against creditors. Whether it is fraudulent or not, depends upon the circumstances under which it is made. *Cook* v. *Holbrook*, 146 Mass. 66. *Clark* v. *McMahon*, 170 Mass. 91. *Blossom* v. *Negus*, 182 Mass. 515. It is ordinarily a question of fact whether a conveyance was made with intent to hinder, delay or defraud creditors. But in considering such cases the principle is applied that one is presumed to intend the natural consequences of his act. If the known conditions are such that the effect of the act will be to hinder, delay or defraud creditors, the inference follows as matter of law, unless there is something else to control it.

In the present case the conveyance was of substantially all the grantor's property. Both he and his wife, to whom through a third person the conveyance was made, knew that he was insolvent. In fact, he owed about $75,000. The conveyance was in trust to manage the property, with a power to sell and convey or mortgage all or any part of it, and to apply the net proceeds to the payment of taxes and assessments upon the property, interest or principal upon mortgages when payments upon them were required, and of such of the debts and personal expenses of Edward Thompson as it might seem judicious to the trustee to pay out of the proceeds. On the decease of Edward Thompson the trustee was to sell any part of the property then remaining unsold, and to distribute the net proceeds among the persons and in the manner and proportions designated in the last will of Edward Thompson, and in default of such will, among the persons who would have inherited the premises if Edward had died seized of the same, intestate. The effect of the conveyance was to put a large estate of an insolvent person beyond the reach of his creditors. Whether they would ever receive anything from it, was made dependent upon the action of the grantee under the

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trust and the action of the grantor under the power of appointment. Unless he exercised the power of appointment in favor of creditors, the property would all go, upon his death, to his heirs at law.

We have been referred to no case in which it is held that such a conveyance is valid against creditors. It is generally if not universally held that freedom from moral turpitude, and an innocent and honest intention to accomplish a good object in the disposition of the property, is not enough to relieve a transaction of this kind from its fraudulent character, in reference to its effect upon the legal rights of creditors. *Freeman* v. *Pope*, L. R. 5 Ch. 538. *Smith* v. *Cherrill*, L. R. 4 Eq. 390, 395. *French* v. *French*, 6 DeG., M. & G. 95. *Taylor* v. *Coenen*, 1 Ch. D. 636. In the case first cited, Giffard, L. J. says, "But where the conveyance is voluntary, then the intent may be inferred in a variety of ways. For instance, if after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent, and it would be the duty of a judge, in leaving the case to the jury, to tell the jury that they must presume that that was the intent. Again, if at the date of the settlement the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay them." In *Smith* v. *Cherrill*, Vice Chancellor Malins said, "If a person makes a voluntary settlement, and is, at the time, indebted to the extent of insolvency, . . . that settlement is void as against creditors." The decisions in the Federal and State courts of this country are to the same effect. *Coolidge* v. *Melvin*, 42 N. H. 510, 531. *Freeman* v. *Burnham*, 36 Conn. 469. *Wilson* v. *Howser*, 12 Penn. St. 109, 117. *Kuhn* v. *Stansfield*, 28 Md. 210. *Stewart* v. *Rogers*, 25 Iowa, 395. In *Fellows* v. *Smith*, 40 Mich. 689, 690, Chief Justice Campbell said, "Upon the whole case, while we do not think any fraud was intended, yet we think the conveyance is shown to have been without any legal consideration and voluntary." In *Crawford* v. *Kirksey*, 55 Ala. 282, this language is found in the opinion: "Such disposition is constructively fraudulent, as against the existing debts of the grantor, no matter how innocent or meritorious the mo-

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tive with which it is made." In 14 Am. & Eng. Encyc. of Law, (2d ed.) 301, the proposition is stated in this way: "If at the time of the voluntary conveyance the donor is insolvent, the deed is fraudulent, and evidence that no fraud was intended cannot change its character." In the note, decisions from the English and Federal courts, and from the courts of thirty-five American States are cited as supporting the proposition.

In this Commonwealth, while in dealing with the question of fraudulent intent as a question of fact more liberality has been shown to grantors than in many jurisdictions, we find nothing to show that a conveyance of this kind may be held valid as against creditors. In *Kimball* v. *Thompson*, 4 Cush. 441, 446, Mr. Justice Wilde shows that a conveyance made with intent to delay, hinder or defraud any creditor or creditors is utterly void, notwithstanding that no moral turpitude is indicated. In *Marden* v. *Babcock*, 2 Met. 99, 104, Chief Justice Shaw, in speaking of the intent, says, "If the grantor was in debt at the time, as such conveyance must necessarily tend to defeat the rights of creditors, and as all persons are presumed to contemplate and intend the natural and probable consequences of their own acts, the conclusion is irresistible, that such conveyance was intended to defeat creditors, and is therefore fraudulent." In *Norton* v. *Norton*, 5 Cush. 524, 528, this is the language of the opinion: "The conveyance of property by way of gift, by one deeply in debt, if thereby he becomes incapacitated to pay his debts, is legally fraudulent as to his creditors; and, if in the present case, such should be found to have been the fact, as to the circumstances attending this conveyance, it may be deemed in law fraudulent, though no such fraudulent intention existed in the mind of the grantor, he not properly considering the amount of his indebtedness, or the extent of his assets." In *Winchester* v. *Charter*, 12 Allen, 606, 609, Chief Justice Bigelow refers to a foundation for an inference, as distinguished from proof of an express intent to defraud. These are his words: "Whenever, therefore, no actual fraud or express intent to hinder and delay creditors is proved, it is necessary to show that a grantor at the time of making a voluntary conveyance was indebted beyond his probable means of payment remaining after the conveyance, in order to lay the foundation for the inference that it was made with a

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fraudulent design." Chief Justice Morton, in *Cook* v. *Holbrook*, 146 Mass. 66, uses this language: "If made when a person is deeply indebted, it furnishes *prima facie* evidence of fraud; but this may be rebutted or controlled, and the question of fraud is not one of law, but of fact for the jury." If the facts proved are *prima facie* evidence of fraud, the jury should be instructed to return a verdict accordingly, unless there are other facts which control the inference. The latest case in this court is *Gray* v. *Chase*, 184 Mass. 444, in which it is said by Mr. Justice Lathrop that, "The case therefore falls within the ordinary rule, that one who is deeply in debt, and especially when he is insolvent, and who makes a voluntary conveyance which takes property away from his creditors, is presumed to intend the natural consequences of his act, which is to hinder and delay his creditors." See also *Bullard* v. *Briggs*, 7 Pick. 533, 537; *Jaquith* v. *Massachusetts Baptist Convention*, 172 Mass. 439.

The question whether a conveyance was made with an intent to hinder, delay, defeat or defraud creditors, in this Commonwealth, is primarily a question of fact; but such facts as appear in this case are *prima facie* evidence of the intent, which, uncontrolled, call for a legal inference that the intent exists. The decision of the question in a case of this kind does not depend upon the existence or non-existence of moral turpitude on the part of the grantor; but upon an unjustifiable purpose to deprive creditors of their legal rights. Nor is it important that this should be the primary, active, controlling purpose. It is enough if it is one of the purposes which was entertained, either directly or as incidental to a more active purpose. The presumption that one intends the natural consequences of his acts, under known conditions, is usually the controlling principle, in its application by courts and juries to such cases.

The presiding justice found that the parties acted with an honest intention, and that neither Mr. Thompson nor Mrs. Thompson had any purpose of cheating their creditors. This must be held to mean that they thought their act was morally right, and that they had no desire or active purpose ultimately to leave the creditors unpaid. But they knew of the grantor's insolvency, of which the attorney who made the papers was ignorant, and they knew that his indebtedness was very large,

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and that this was substantially all of his property. They knew that this conveyance, if given effect, would put it out of the power of any creditor to appropriate any of this property to the payment of his debt. The further finding that they had no "intention or purpose of hindering, delaying, or defrauding any creditor of Mr. Thompson, but the purpose was to preserve the property from the threatened foreclosure for those interested therein," taken in connection with the other findings of fact, must be held to relate to the active, controlling motive under which they acted, and not to an intent and purpose which must be found incidentally to exist, from the facts, and from the inevitable consequences of their act, of which they had full knowledge. These facts were entirely uncontrolled by any other findings. They are evidence which, in law, points to a necessary conclusion as a legal inference, unless they are met by controlling facts. We are of opinion that they show a purpose and intention which were legally fraudulent, although they are not accompanied by moral turpitude, nor the desire or intention that the ultimate result should be harmful to the creditors. The deed must be set aside as fraudulent.

We already have seen that this would leave the widow with her right of dower unaffected by the release which she executed in connection with her husband's deed. But the will of her husband cuts off her right of dower, and having accepted its provisions she cannot now have her dower set out to her. She might have waived its provisions, and if she had done so, she would have been entitled to dower. Pub. Sts. c. 127, §§ 18, 20. *Barnard* v. *Fall River Savings Bank*, 135 Mass. 326. *Dexter* v. *Codman*, 148 Mass. 421.

In the second suit the entry will be, bill dismissed; in the first suit there will be a decree for the plaintiff.

So ordered.

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ELIJAH W. SELLS, trustee, *vs.* PHILLIP M. DELGADO & others.

Norfolk. January 25, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Trust, Powers of trustees.

A testatrix, having created a trust for the benefit of her two children, provided as follows: "But upon each of my children attaining the age of twenty-five years, then my trustees or the survivor of them may, if in their or his discretion they or he deem it prudent and advantageous, pay over and convey to the one reaching that age his or her respective share, to vest in him or her absolutely and forever, and my said trustees or the survivor of them shall be the sole judges, and I leave it entirely to their or his discretion to decide whether or not it will be prudent and advantageous for any of my children on his or her reaching that age to receive the principal of his or her respective share." Two trustees were named in the will but neither of them qualified as such and one of them died. A new trustee was appointed who, after one of the children of the testatrix had reached the age of twenty-five years, brought a bill for instructions as to his power to make a partial distribution of the trust estate. *Held*, that the power in question not being limited by its terms to the first trustees vested in the new trustee under R. L. c. 147, §§ 6, 7, and that in his discretion he could pay one half of the entire trust estate to the child of the testatrix who had reached the age of twenty-five years.

BILL IN EQUITY, filed October 16, 1903, by the trustee under the will of Ella A. Delgado, appointed in place of the trustees named in that will, for instructions as to his power to distribute one half of the trust fund to Marina Elena Parke, one of the children of the testatrix, who had attained the age of twenty-five years and had requested such distribution.

The case came on to be heard before *Hammond, J.*, who at the request of the parties reserved it upon the bill and answers for determination by this court.

The will of Ella A. Delgado contained the following clauses:

"Fifth: I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal or mixed, wheresoever situated, unto my executors and trustees hereinafter named, or the survivor of them, in trust, to divide the same at the time of my decease into two equal parts or shares, and to set apart one of said shares for the benefit of my daughter, Marina Elena Del-

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gado, and the other share for the benefit of my son, Phillip Mario Delgado; to collect the income of each share as it accrues, and pay out of the income of each share for the maintenance and education of each respectively, and to accumulate whatever is left over of the income of each respective share and invest it for the benefit of each during his or her respective minority, and my trustees or the survivor of them shall pay over to him or her when he or she attains the age of twenty-one years, the accumulations of the income of his or her respective share, and shall hold and retain the share of each during his or her natural life, and continue paying to each the income of his or her respective share during his or her life respectively, and at the death of either the share of the one dying on failure of issue, him or her surviving to become a part of the original trust fund held by my executors and trustees for the one surviving, and to be held by them for the benefit of the survivor precisely in the same manner, upon the same conditions, and to be paid to the survivor on the event and as herein provided with reference to the original trust fund of his or her share.

"But upon each of my children attaining the age of twenty-five years, then my trustees or the survivor of them may, if in their or his discretion they or he deem it prudent and advantageous, pay over and convey to the one reaching that age his or her respective share, to vest in him or her absolutely and forever, and my said trustees or the survivor of them shall be the sole judges, and I leave it entirely to their or his discretion to decide whether or not it will be prudent and advantageous for any of my children on his or her reaching that age to receive the principal of his or her respective share.

"Sixth: I appoint my friends, Emilio Del Pino, now residing at No. 15 East 32nd Street, New York City, and Lester A. Beardslee, now residing at Little Falls, New York State, joint executors and trustees of this, my last will and testament, giving and granting unto my said executors and trustees or the survivor of them power to sell or convey my real estate at public or private sale, giving proper deeds therefor whenever they or he in their or his discretion deem it convenient for the benefit of my estate.

"Seventh: I appoint the said Emilio Del Pino and Lester A.

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Beardslee joint guardians or the survivor of them guardian of the persons and estates of my children, Marina Elena and Phillip Mario Delgado, during his or her respective minority.

"Eighth: And in case one of my executors and trustees and guardians of my children should die, the survivor is clothed with the same authority and discretionary powers hereinbefore given and granted to them jointly."

J. M. Hallowell, for the defendants Marina Elena Parke and Fred K. Parke.

W. H. Lewis, guardian *ad litem*, & *J. L. Dyer*, for the defendant Phillip Mario Delgado, submitted a brief.

BRALEY, J. The general rule at law is that where a power is created and given in a will or deed by words that clearly indicate that the donor of the power placed special confidence in the donee, so that the element of personal choice or selection is found, then the exercise of such a power must be confined to and exercised by the person or persons thus selected, and ordinarily is not transmissible. *Richardson* v. *Morey*, 18 Pick. 181, 187. *Shelton* v. *Homer*, 5 Met. 462, 465. *Tainter* v. *Clark*, 13 Met. 220, 226. *Greenough* v. *Welles*, 10 Cush. 571, 575. *White* v. *Ditson*, 140 Mass. 351, 359.

Among other questions raised it becomes important first to determine whether the trustees named in the will of the testatrix come within this rule. She provided that the bulk of her estate should be divided into "two equal parts or shares" and respectively held in trust for the sole use and benefit of her children, the income arising therefrom to be paid to them with rights of survivorship as to principal and income not now material to the decision of the case. The further provision appears that when either attained the age of twenty-five years, if in the judgment of the trustees, or the survivor of them, it was prudent and for their welfare, the property then might be distributed, and that part coming to each paid and the trust wholly or partially determined.

In the fifth clause which created the trust, she does not speak of the trustees by name, but they are referred to as "my . . . trustees hereinafter named, or the survivor of them."

In the sixth clause they are spoken of by name, and appointed trustees to execute the trust created in the preceding clause.

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The language used by her is apt to express her purpose; and to them she confided discretionary powers in the management of the trust estate, and it was provided that, in case of the death of one, the survivor succeeded to all the authority possessed by both. An examination of the record discloses the fact that of the original trustees one has died, and though they were duly appointed executors, yet they never qualified as trustees, and must be held by their conduct to have disclaimed the office.

But a person named as trustee in a will or other instrument is not obliged to accept and execute the trust. He may expressly decline to serve, or, by his failure to act or to take such steps as may be required legally to qualify him for his office, may leave it completely unexecuted, and if his conduct was conclusive, then it would follow that the trust itself would fail for want of a trustee to carry it into effect.

This is not permitted, and under such conditions a court having jurisdiction of the probate of the will, or vested with general equity jurisdiction, will, upon application of those interested as beneficiaries or otherwise, appoint a trustee or trustees to administer the trust as if none had been originally named or appointed. *Bowditch* v. *Banuelos*, 1 Gray, 220. *Attorney General* v. *Barbour*, 121 Mass. 568, 574. *Carruth* v. *Carruth*, 148 Mass. 431.

For it is a familiar maxim in equity that a trust shall not be allowed to fail for want of a trustee, and in a case like that under consideration the power conferred is not a mere detached naked authority purely discretionary with them which may be exercised at their pleasure, but is blended with the trust to which it attaches. *Gibbs* v. *Marsh*, 2 Met. 243, 251. *Leeds* v. *Wakefield*, 10 Gray, 514, 517.

A different construction would cause a serious impairment of the full design of the testatrix and leave it imperfectly executed; although the receipt of the income is assured, yet it may be equally, if not more, advantageous to the beneficiaries to call for a distribution of the principal to be made under the provisions of the will, and it might be a great hardship to either if deprived of this privilege because the power to make the distribution was found to be limited to the persons named as trustees in the will.

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That she did not intend such a result is shown not only by her purpose that her children, if found competent, were to be permitted when of mature age to receive the principal, but also in the use by her of the comprehensive phrase " my trustees or the survivor of them ", and if it had been a part of the general plan to limit such a power to those originally selected then she would have used words to make plain such a limitation.

It may therefore be inferred that her intention was not to restrict its exercise to those named, but rather to confer it on whomsoever should be appointed to administer the trust.

At the time when her will was admitted to probate it had been the settled law of this State for seventy-five years that when a trustee under a written instrument declines to serve or resigns, or is removed, a new trustee appointed in his place under a trust similar to that created by this will shall have and exercise the same powers, rights and duties as the original trustee, and by force of law on such appointment being made the estate vests in him as if he had been primarily designated. St. 1817, c. 190, §§ 40, 41. Rev. Sts. c. 69, §§ 7, 8. Gen. Sts. c. 100, § 9. Pub. Sts. c. 141, §§ 5, 6. R. L. c. 147, §§ 5, 6. *Richardson* v. *Morey*, 18 Pick. 181. *Nugent* v. *Cloon*, 117 Mass. 219, 221. *Bradford* v. *Monks*, 132 Mass. 405. *Wemyss* v. *White*, 159 Mass. 484. *Stanwood* v. *Stanwood*, 179 Mass. 223. See also *Chase* v. *Davis*, 65 Maine, 102; *Woodfall* v. *Arbuthnot*, L. R. 8 P. & D. 108, where under similar statutory provisions a like result was reached. Compare *Leggett* v. *Hunter*, 19 N. Y. 445.

The object of this provision of the statute is to remove any doubt as to the authority of trustees to act who may from any cause take the place of, and are substituted for those named in the instrument, and by the act of succession the trust itself is not in any way impaired or narrowed, but is kept alive and fully executed. If a power of the nature under discussion has been given but is not strictly limited by its terms to the first trustees by name, then those who succeed them, by the operation of the statute, become clothed with a like authority, and they may, when acting honestly, either execute the power or refuse to exercise the discretion left open to their personal judgment. *Wemyss* v. *White*, and *Stanwood* v. *Stanwood*, *ubi supra*.

It must therefore be held that the petitioner under his appoint-

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ment by the Probate Court has succeeded to all the powers and duties originally conferred, and possesses the right to determine whether the trust estate shall now be divided according to the provisions of the will.

No occasion is found which requires a consideration of the question that might arise whether a trustee vested with such powers, but who refuses to exercise them, could be compelled by a court of equity to take action, for the petitioner states in his petition that in his opinion and judgment he considers "it advantageous, prudent and desirable" that Marina Elena Parke, one of the beneficiaries, who is within the preliminary condition as to age, should now receive her share of the property. *Eldredge* v. *Heard*, 106 Mass. 579. *Proctor* v. *Heyer*, 122 Mass. 525.

Because there is a bare possibility that she and her children may not survive him, her brother Phillip Mario Delgado, who though of age is not yet twenty-five years old, and has become insane, by his guardian *ad litem* opposes the granting of the petition, on the ground already discussed, but the will confers on the trustees, or the survivor of them, the right to determine, after either of the beneficiaries has reached the age of twenty-five years, when in his or their judgment the event shall happen upon which distribution of the property shall be made, and for the reasons stated the present trustee can in his discretion pay over to the daughter of the testatrix one half of the entire trust estate.

Decree accordingly.

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ELIZA J. TAFT *vs.* LEWIS H. SMITH, executor.

Franklin. January 26, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Trust, Sound discretion of trustee as to investments, Negligence of trustee.

There may be circumstances under which an investment in a second mortgage by a trustee is not inconsistent with sound discretion.

A trust small in amount consisted principally of a farm. For the purpose of the trust it became necessary that the farm should be sold and the Probate Court authorized its sale. The trustee sold the farm subject to a first mortgage of $1,300 at a valuation of $4,300 including the first mortgage. The purchaser assumed the first mortgage, paid $1,000 in cash, and gave his note for the balance of $2,000 payable in annual sums of $200 each, secured by a second mortgage on the property. The farm was on the main street of a town and there was no reason to anticipate its decrease in value. By the terms of the trust such portion of the principal as might be necessary might be expended for the support of the *cestui que trust* for life. The purchaser of the farm became insolvent and a sale of the property under the second mortgage, subject to the first mortgage, produced only $800. In a suit against the executor of the trustee for an accounting, it was *held*, that the court could not say that, under the circumstances then existing and acting in the light which he had, the trustee did not exercise a sound discretion in making the loan secured by the second mortgage.

A trustee, holding the mortgage and note of an insolvent debtor, by agreement with the assignee of the insolvent sold the property, indorsed the amount of the proceeds on the note and filed a claim for the balance against the estate of the debtor in insolvency. The Court of Insolvency rejected the claim for the balance because the sale had been made without the assent of that court. It did not appear that the assignee had any property in his hands belonging to the estate of the insolvent. In a suit against the executor of the trustee for an accounting, it was *held*, that it did not appear that any loss was suffered by the trust from the failure of the trustee to obtain the assent of the Court of Insolvency to the sale.

BILL IN EQUITY, filed March 2, 1903, for an accounting for certain property alleged to have been held in trust for the plaintiff by the defendant's testator.

The defendant demurred to the bill. The Superior Court overruled the demurrer, and the defendant appealed. The case was referred to a master who made a report, to which the plaintiff waived all exceptions and the defendant all exceptions save one. After the master made his report the defendant filed a motion to dismiss the bill which was denied. The case was sub-

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mitted to *Aiken*, J. on the master's report and the one exception of the defendant thereto. The judge ordered, *pro forma*, that the bill be dismissed, and at the request of the parties reported the case for determination by this court. If the order of the judge that the bill be dismissed was right, a decree was to be entered accordingly; otherwise such decree was to be entered as justice and equity might require.

B. H. Winn, (*F. J. Lawler* with him,) for the defendant.

H. J. Field, (*A. D. Flower* with him,) for the plaintiff.

HAMMOND, J. All exceptions to the form of the proceedings having been waived by the defendant, the case is before us on the master's report; and the first question arising on the merits is whether the investment in the second mortgage was improper. It has long been the rule in this Commonwealth that in making investments, as well as in the general management of the trust, a trustee is held only to good faith and sound discretion, and hence that he cannot be held for the consequences of an error in judgment unless the error is such as to show either that he acted in bad faith or failed to exercise sound discretion. *Harvard College* v. *Amory*, 9 Pick. 446. *Pine* v. *White*, 175 Mass. 585, 590. The master having found that the trustee acted in good faith, the real question upon this branch of the case is whether he failed to use sound discretion.

Of course this question should be determined with reference to the situation at the time the investment was made, and not in the light of such subsequent events as could not have been reasonably anticipated. The trust fund was small, and not only the income, but such portion of the principal as might be necessary, might be expended for the support of the *cestuis que trust* for life; and it seems quite apparent from the master's report that at the time of the sale of the real estate the personal property in the trust had been exhausted and that good management required that the real estate should be sold for the purpose in part of paying outstanding claims for which the trust fund was ultimately liable. The real estate consisted chiefly of a farm subject to a mortgage to the amount of $1,300. By authority of the Probate Court the property was sold to one Martin, at a valuation of $4,300, including the first mortgage. This left $3,000 due to the trust; and Martin paid $1,000 in cash and in pay-

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ment of the balance gave his note for $2,000, payable in annual sums of $100 each, with interest at the rate of seven per cent per annum, secured by a second mortgage on the property. Martin also assumed and agreed to pay the first mortgage. The trustee was a farmer, having owned and occupied for many years a farm which was situated about a mile distant from the farm mentioned above, both being on the same road. He was one of the selectmen of the town and had settled several estates. From the glimpses we get of him he evidently was a sturdy New England yeoman of the best type. By the sale he had received $1,000 in cash, and had as security for the balance of the purchase money of $2,000, what he had just sold for $3,000 to a *bona fide* purchaser, who, we infer, bought the farm for the purpose of occupying it himself as a farmer. The trustee was familiar with the farm and its value for farming purposes. It is true that his security was subject to a prior mortgage, but he might well have thought that in view of its size, whether absolute or relative, there was nothing to be feared from that. In this he seems to have been right, for the trouble in this case is due in no respect to the existence of the first mortgage. The farm was not on some lonely, unfrequented road, but was on the main street in the town. So far as appears the trustee had no reason to anticipate that the value of the property would decrease to any appreciable extent, much less to the extraordinary degree of fifty per cent in seven years. Moreover the mortgage provided for the annual payment of $100 a year on the principal. It is to be noted also that the depreciation does not seem to have been due to any mismanagement of this particular farm, but to general causes applicable to the whole neighborhood and not foreseen at the time of the sale. We are aware that in several cases in other States it has been stated that a trustee should not invest in second mortgages. While we accept that as a principle generally to be applied, we cannot accept it as an absolute, ironclad rule. After all, the true rule is whether under the circumstances sound discretion was exercised, and it cannot be said that under every conceivable practical set of circumstances an investment in a second mortgage is inconsistent with sound discretion. In view of the nature and size of the trust, taken in connection with the provision that from time to time

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some portion of the principal might be expended as required for the support of the *cestuis que trust* for life, and in view also of the small size of the first mortgage, either absolute or relative to the value of the whole estate, of the character and size of the farm, and of the improbability that its value would so far depreciate as to result in loss on the mortgage, we cannot say that, acting in the light which he had, the trustee did not exercise sound discretion in making the loan. Nor did he violate the terms of his license.

The next question is whether the trust fund is shown to have suffered any loss by the manner in which the trustee undertook to realize upon the note and mortgage of Martin at the time of the insolvency of the latter. It appears from the report of the master that the trustee and the assignee of Martin's estate agreed to join in making a sale of the land subject to the first mortgage, the proceeds of the sale to be indorsed on the note. The land was accordingly sold for the sum of $800, which sum was indorsed upon the note, and then the trustee undertook to prove against Martin's estate in insolvency the balance due, amounting to $1,261.29. The assignee made no objection, but on the objection of Martin, the debtor, the court rejected the claim on the ground that the sale not having been made under the supervision of the court the right to prove against the estate for the balance due was lost. Gen. Sts. c. 118, § 27. See *Smith* v. *Warner*, 133 Mass. 71. As to this matter, it is found by the master that the trustee acted in good faith, and that it did not appear that the assignee had any property in his hands belonging to the estate of Martin. Under these circumstances, even if it be assumed that the trustee, although acting in good faith, could not successfully plead his ignorance of the law as a justifiable excuse (*Pierce* v. *Prescott*, 128 Mass. 140), it is not shown that the estate suffered by the loss of the right to prove the balance of the note. No loss being shown by this act, there is no occasion to consider it further.

The result to which we have come upon these questions renders it unnecessary to pass upon the validity of the conveyances of his private property made by the trustee to the defendant as set out in the bill.

Bill dismissed.

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KERVIN R. DUNTON *vs.* DERBY DESK COMPANY.

Suffolk. January 27, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Corporation, Authority of officers. *Agency*. *Contract*, What constitutes. *Evidence*, Remoteness.

Whether the general manager of a manufacturing corporation had authority to employ a superintendent of the corporation's factory, properly may be treated as a question of fact.

In an action against a manufacturing corporation by a superintendent of its factory for alleged breach of contract in discharging the plaintiff from its employ, it appeared, that the plaintiff worked for the defendant as superintendent for one year at a salary of $3,500 a year and in the following year, in which he alleged that the defendant again employed him, he continued to work as superintendent for about seven months and was paid at the same rate up to the time of his discharge. *Held*, that this was evidence of some contract express or implied on the part of the defendant to employ the plaintiff as superintendent in the second year, and that the fact that the employment was continuous had an important bearing on the matter.

In an action against a manufacturing corporation by a superintendent of its factory for alleged breach of contract in discharging the plaintiff during a second year after he already had been employed as superintendent at a certain salary for one year, if the presiding judge correctly instructs the jury that the plaintiff, to prevail, must prove that both parties must have understood that there was a contract for the second year, it does not matter that he also gives other instructions as to what the plaintiff had the right to understand, especially where these instructions also are correct.

In an action against a manufacturing corporation by a superintendent of its factory for alleged breach of contract in discharging the plaintiff, where the defendant contended that the discharge was justified because the plaintiff had neglected or wilfully failed to perform the duties for which he was employed, there was evidence that the plaintiff while superintendent had full charge of the operation of the defendant's factory and that the factory was equipped sufficiently for properly furnishing the goods required in the defendant's business. The defendant offered to show that during a period of six months before the plaintiff's discharge there was a loss of about $20,000 in the business and that the general manager, from an investigation made on his return from Europe during the period in question, would testify that the cause of the loss was largely the result of not properly furnishing the goods for the business and that it was traceable to the factory. The evidence was excluded. *Held*, that the exclusion was right, the plaintiff's neglect or wilful failure to perform his duties, if a fact, being susceptible of direct proof, and the loss or profit of a manufacturing company being dependent on so many conditions as to have no necessary bearing on the conduct of the superintendent.

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LATHROP, J. This is an action to recover the balance due on an alleged contract to employ the plaintiff as superintendent of the defendant's factory, for the term of one year from July 1, 1900, to July 1, 1901, at the rate of $3,500 a year. In the Superior Court the jury returned a verdict for the plaintiff; and the case is before us on the defendant's exceptions.

The plaintiff testified, without objection, that in July, 1899, he went to see one Pond, a director and the general manager for the defendant, to find out what agreement was to be made for the year already entered upon, the business year of the defendant ending on June 30; that he told Pond that he ought to be worth $3,500, and Pond said he would see one Swift, the president of the company, who was also a director; that some time later Pond told him he had seen Swift and Swift said he was willing to pay any salary the plaintiff requested; that he named $3,500, and Pond said it was all right. No question appears to have been made that for the business year ending June 30, 1900, the plaintiff was paid at this rate.

The plaintiff further testified that nothing further was said until about the middle of August, when Pond was going to Europe to be gone six or eight weeks, when he saw Pond again, and asked him about an arrangement for the year beginning July 1, 1900, and proposed that he be paid $4,000; that Pond said he would take up the matter with Swift; that later Pond told the plaintiff that Swift did not want to make any change in the salaries, and wished him to continue the same as last year; and that the plaintiff acquiesced.

Pond admitted the arrangement for the year beginning July 1, 1899, but denied that any arrangement was made for the following year, and testified that after June 30, 1900, the plaintiff came to him and asked him what arrangement could be made for another year, and that he told him he would see the directors about it; that after seeing the directors, he told the plaintiff that "we could not make any further arrangement."

The only other witness was Swift, who testified that the matter was brought before the board of directors in July, 1899, and again in 1900, and that in that year Pond was forbidden by the board of directors to make any contract whatever; and that it had not been their custom to make minutes of a meeting for considering the matters of salaries.

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It appears from the bill of exceptions that the plaintiff continued to act as superintendent until January 21, 1901, when he was discharged, and paid up to February 1, following. There were but three directors in the company.

At the close of the evidence the defendant requested the judge to order a verdict for the defendant, on the ground that there was no evidence that Pond was authorized to make the contract declared on, and no evidence that the contract was made by or with the defendant corporation. The judge refused to give this instruction, and submitted the case to the jury.

As to the first ground of objection, it is enough to say that the judge instructed the jury that, as matter of law, "Pond had no authority by virtue of the fact that he was the general manager to make a contract." This was sufficiently favorable to the defendant, and perhaps too favorable. The question of the authority of a general manager may be a question of fact. In some corporations it often happens that the whole power of making contracts for the employment of subordinate officers and men is left practically with the general manager; and so he may make a contract which is incidental to something which he is authorized to do. *Henderson* v. *Raymond Syndicate*, 183 Mass. 443, 446.

The second ground of objection is that there was no evidence that the contract was made by or with the defendant corporation. We are of opinion that this objection is not tenable. It is admitted that a contract existed for the previous year at a fixed sum. It is also admitted that the plaintiff continued to work in the same capacity until he was discharged, and was paid the same wages he had previously received. There was therefore some contract express or implied. What this was, was a question for the jury on all the evidence in the case, and the fact that the service was continuous had an important bearing on the case. *Tatterson* v. *Suffolk Manuf. Co.* 106 Mass. 56. See also *Davis* v. *Ames Manuf. Co.* 177 Mass. 54; *O'Connor* v. *Briggs*, 182 Mass. 387.

The second and third exceptions are the same as the first in a slightly different form, and are disposed of by what we have already said.

The fourth exception relates to the following portion of the charge: "The plaintiff says that in the previous year there was a contract made by the directors and reported to him by Mr.

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Pond, and that he, the plaintiff, understood that this year the situation was the same. . . . Now all I meant to say by that was that it was evidence to him to justify him in supposing that Pond was reporting from the directors this year as he had in the year previous, and that as when in the year previous Pond spoke the directors spoke, so this year he had a right to infer that when Pond spoke the directors spoke."

We see no error in this; nor do we think that the matter is of any importance. In other parts of the charge the jury were fully instructed as to what the plaintiff must prove before he could prevail, namely, that both parties must have understood that there was a contract for the second year. In the part excepted to the judge was dealing only with one element of the contract, namely, what the plaintiff had the right to understand.

The last exception relates to the exclusion of evidence. The defendant contended that it was justified in discharging the plaintiff, even if a valid agreement was made for a year's service in August, 1900, because the plaintiff had neglected or wilfully failed in material respects to perform the duties for which he was employed. There was evidence that the plaintiff had full charge of the operation of the defendant's factory while he was superintendent thereof, and that said factory was sufficiently equipped in all respects for properly furnishing the goods required for the defendant's business.

The defendant offered to show that there was a loss of about $20,000 in the business from the first of July, 1900, to the first of January, 1901, and that from investigation made after Pond's return from Europe in November, 1900, he would testify that the cause of that loss was largely the result of not properly furnishing the goods for the business, and it was traceable to the factory.

We are of opinion that the evidence offered was properly excluded. If the plaintiff had neglected or wilfully failed to perform his duties this was susceptible of direct proof, and the loss or profit of a manufacturing company is dependent upon so many conditions that there is no necessary connection between them and the conduct of the superintendent.

Exceptions overruled.

F. Hutchinson & A. S. Hutchinson, for the defendant.

G. A. Bruce, for the plaintiff.

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OTIS H. HARDING *vs.* LOTTIE M. ELDRIDGE.

Barnstable. January 28, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Mortgage, Of chattels. *Pledge*. *Power*. *Practice, Civil*, Amendment. *Equity Jurisdiction*.

In an action of replevin for a piano, it appeared, that the defendant, being the owner of the piano, signed a paper promising to pay E. a certain sum of money with interest at a rate named "for one year from date, and having pledged with said E. as security for payment my piano [described] and I give said E. full power to sell said piano at public or private sale at any time after one year, giving three weeks' notice and applying proceeds of sale for payment of note accounting to me for surplus, if any." E. recorded this instrument in the office of the town clerk. The piano never was delivered to E. but remained in the possession of the defendant. More than a year after the date of the instrument, the defendant having made default, E. after giving three weeks' notice sold the piano at private sale to the plaintiff. *Held*, that there was no mortgage because the instrument signed by the defendant contained no words of grant or sale and the recording was of no effect, nor was the transaction a pledge because there was no delivery; therefore that the exercise of the power of sale on default could transfer no title or right of possession and the action could not be maintained. *Whether* the attempted sale operated as an assignment of equitable rights and the plaintiff could by amendment change his action at law into a suit in equity to enforce the agreement of the defendant, or whether if there was a remedy in equity it must be enforced by E. to whom the promise was made, *quære*.

REPLEVIN for a piano. Writ dated December 30, 1902.

At the trial in the Superior Court before *Richardson*, J., without a jury, the plaintiff and one Edwards, under whom he claimed, were the only witnesses called and the facts were not in dispute. It appeared that before August 26, 1901, the piano was the property of the defendant and was in the defendant's house at Chatham, where it remained until taken by the officer on the replevin writ. On August 26, 1901, the defendant signed the following instrument in writing: "Chatham, Mass., Aug. 26th, 1901. On demand I promise to pay Luther S. Edwards of Chatham, Mass., or order Thirty-five Dollars for value received with interest at 6 per cent for one year from date and having pledged with said Luther S. Edwards as security for payment my piano named the Woodward and Brown number as recorded in the Woodward and Brown office, Boston, and I give

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said L. S. Edwards full power to sell said piano at public or private sale at any time after one year, giving three weeks' notice and applying proceeds of sale for payment of note accounting to me for surplus, if any. Lottie M. Eldridge. Witness, A. Thacher."

The piano never was delivered to Edwards but remained in the possession of the defendant. Edwards recorded the paper signed by the defendant in the office of the town clerk of Chatham. More than a year after the date of the paper Edwards, not having received the $35 upon demand and having given to the defendant three weeks' notice, sold the piano at private sale to the plaintiff for $48.

In the Superior Court the plaintiff contended that the paper signed by the defendant was a mortgage or other instrument under which the plaintiff obtained such a title that he was entitled to maintain the action, and the defendant contended that the transaction was an attempt to pledge which was not consummated because there was no change of possession. The defendant requested the judge to rule that upon the evidence the defendant was entitled to a finding. The judge after taking the case under advisement filed the following memorandum of his finding: "It is not necessary to determine whether the paper which the defendant gave to Mr. Edwards on Aug. 26, 1901, is technically a pledge or a mortgage; but the purpose and intent of the defendant upon the evidence is clear, which was to give to Edwards the right and power to take the piano and sell it — 'after one year, giving three weeks' notice' — and thereby to give to the purchaser a good title to it. This power was complied with, and I find that the plaintiff acquired a good title to the piano." The judge refused to rule as requested by the defendant and found for the plaintiff. The defendant alleged exceptions.

C. Bassett & H. H. Baker, for the defendant, submitted a brief.

H. A. Harding, for the plaintiff.

BRALEY, J. The plaintiff must prevail on the strength of his own title, and if under the alleged sale the title of the defendant did not pass to him, he never gained a legal right of ownership in the piano and cannot maintain this action.

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When the note was negotiated and up to the date of the service of the writ of replevin, the piano remained in the possession of the defendant, and there never has been any delivery of it either to the plaintiff or his predecessor the payee of the note under whom he claims, and the rights of the parties must be determined solely by the written agreement. In construing this agreement a distinction must not be forgotten that it is not a present sale like the case of *Carter* v. *Willard*, 19 Pick. 1, where, as between the parties, no delivery would be required to transfer the title from vendor to vendee, but the intention here was to give and receive collateral security in some form for the payment of the note.

An examination of the contract shows that it is a negotiable promissory note in the usual form, combined with a statement of pledge that the piano was given as collateral security for its payment, joined with a power of sale. It may be treated as an agreement consisting of two parts: one the making of the note; the other the agreement giving security for its payment, though for convenience both are united. No further separation or distinction seems to be justified, for the power of sale is not a mere naked order or license to take the piano if the note is not paid, and sell it, but is appendant to the superior right, to enforce which it is given, and that such was the understanding of the parties is manifest from the form of the proceedings to foreclose, as the sale was not made until after written notice to the defendant, and in strict conformity to the power by which the property could be converted. By recording this contract its terms were not changed, nor did this act impress upon it the character of a mortgage, *Williams* v. *Nichols*, 121 Mass. 435, 436, neither can the fact of record be taken as amounting to a constructive delivery of the property. *Burge* v. *Cone*, 6 Allen, 412.

Though no particular or set form of words are required to constitute a mortgage of personal property, yet it not only must contain language from which the intention of the parties to enter into such an obligation is apparent, but the terms employed must be legally sufficient to carry out such purpose.

In the agreement under consideration none of the elements of a personal grant are found, as the writing signed by the defend-

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ant implied neither a present conveyance of the property, or of a defeasance providing that if the debt was paid the title should revert in her as mortgagor, and for this reason the case cannot be considered as falling within that class of cases in which a formal bill of sale as between the parties, has been held to constitute a mortgage. *Homes* v. *Crane*, 2 Pick. 607. *Thompson* v. *Dolliver*, 132 Mass. 103. *Copeland* v. *Barnes*, 147 Mass. 388.

But if the transaction cannot be classed as a mortgage, it is the contention of the plaintiff that it can be treated as a pledge.

In the language used no direct formal personal pledge is made, but giving to the words "having pledged" the meaning which they naturally import it may be said that there was a present intention to furnish security, which was executed to the extent of signing the combined agreement, and if this had been followed by a delivery the bailment would have been complete. *Radigan* v. *Johnson*, 174 Mass. 68.

Beyond the statement that no actual delivery was made, which term must be considered as meaning a transfer of possession, the exceptions are silent, and whether any further steps were taken by the pledgee, such as taking formal manual possession of the piano, and then leaving it with the pledgor as his agent, is left to conjecture, and cannot be supplied in the decision of the case, which must be left where the parties are content to rest it, with no delivery of a chattel capable of being actually transferred, and the plaintiff's title rests alone on a constructive possession arising out of the paper transaction.

It is uniformly held that by a contract of pledge only a special title passes to the pledgee, which depends on actual possession, while the general right of property remains in the pledgor, and in order to hold and preserve his lien there must be not only a physical delivery, where the chattel can thus be transferred, but continued possession also retained. *Ward* v. *Sumner*, 5 Pick. 59. *Bonsey* v. *Amee*, 8 Pick. 236. *Walker* v. *Staples*, 5 Allen, 34. *Thompson* v. *Dolliver*, 132 Mass. 103. *Shaw* v. *Silloway*, 145 Mass. 503, 506. *Moors* v. *Reading*, 167 Mass. 322. *Beeman* v. *Lawton*, 87 Maine, 543, 546.

But this does not prevent a pledgee from permitting the pledgor to take and use the pledge for any special or limited

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purpose, and if there is no unconditional delivery sufficient to revest the title, the possession, and special property as between them still remains unchanged. *Wilkie* v. *Day*, 141 Mass. 68, 73. *Kellogg* v. *Tompson*, 142 Mass. 76, 78.

It has accordingly been held that the pledgor may be the agent of the pledgee after original delivery, to retain the property pawned, and in such case the intention of the parties control, and the legal title does not change for the reason that the pledgor holds as the agent of his principal. *Kellogg* v. *Tompson*, *ubi supra*. *Casey* v. *Cavaroc*, 96 U. S. 467. *Easton* v. *German-American Bank*, 127 U. S. 532. *Martin* v. *Reid*, 11 C. B. (N. S.) 730.

The plaintiff relies on the decision made in *Macomber* v. *Parker*, 14 Pick. 497, but the case is an authority against his position rather than one in his favor. Among the issues raised in that case was the question of title between an attaching creditor, and the plaintiffs who claimed the property attached, under a pledge to them made by the debtor and the pledgor, who thereafter remained in manual possession of the pledge. But as it appeared that the plaintiffs had taken and retained possession of the property, and that the pledgor at the time of the attachment was acting as their agent, it was held that the pledge was not lost, but constituted a valid lien. Here if the pledgor had sold the piano, or a creditor had attached it, either would have had a good title against any one claiming under the contract. If there was neither delivery nor possession there was no pledge, and this part of the agreement became purely executory, and there was no property on which the alleged foreclosure could operate. *Macomber* v. *Parker*, *Thompson* v. *Dolliver*, *Shaw* v. *Silloway*, and *Casey* v. *Cavaroc*, *ubi supra*.

As the plaintiff has acquired neither title in nor right of possession to the property replevied, he cannot maintain his action. *Pratt* v. *Parkman*, 24 Pick. 42, 44.

If the sale is treated as an execution of the power, which has failed to vest in the purchaser any title because there was no special property in the supposed pledgee that could be transformed by its exercise into full ownership, and the foreclosure therefore operated in equity as an assignment of whatever rights such pledgee may have had, whether the plaintiff can by an

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amendment change his action at law into a proceeding in equity under R. L. c. 159, § 6, treat the attempted contract of pledge as executory and compel the defendant to perform her agreement, or if such remedy exists it must be put in motion by the equitable pledgee himself, are questions which have not been argued and upon which we express no opinion.

Exceptions sustained.

NATIONAL MACHINE AND TOOL COMPANY *vs.* STANDARD SHOE MACHINERY COMPANY.

Suffolk. January 28, 29, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Practice, Civil, Report of assessor, Exceptions, New trial.

A motion to recommit the report of an assessor is addressed to the discretion of the presiding judge and his decision thereon is not the subject of exception or appeal.

If a party to an action desires the findings of an assessor to be reviewed by the Superior Court, he must take specific objections to them and request a report of so much of the evidence as bears upon the points covered by his exceptions. Only in this way can rulings of the Superior Court on questions of law relating to the assessor's report be brought before this court.

In an action of contract after the question of the defendant's liability has been decided against him by this court and the case is ordered to stand for the assessment of damages and is sent by the Superior Court to an assessor, the defendant cannot raise the question of his liability either at the hearing before the assessor or by a request for a ruling of the Superior Court on a motion for a new trial.

CONTRACT by a corporation manufacturing machinery, especially shoe machinery, against a corporation selling shoe machinery, with two counts for work done and for work and materials, and a third count for damages from the defendant's alleged breach of a contract under which the plaintiff agreed to manufacture for the defendant certain parts of a patented machine, called the Bay State Lock Stitch Machine, at prices amounting in all to $12,529.70. Writ dated May 31, 1900.

The case was before the court at a previous stage as reported in 181 Mass. 275. In that decision rendered on May 19, 1902,

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this court held that on the facts found by the auditor and by the trial judge in the Superior Court the defendant was liable to the plaintiff, and ordered that the case "stand for assessment of damages."

On October 22, 1902, the case was sent by the Superior Court to an assessor "to assess the plaintiff's damages and report his finding thereon" to that court. There were hearings before the assessor, in the course of which objections were taken by the defendant to rulings upon and the admission of evidence, and after argument by counsel the assessor took the case for consideration, and on May 14, 1903, filed in the Superior Court his report without having first submitted any draft of it to counsel or having conferred with them about the form of the report.

After the argument before the assessor and before the filing of his report, the defendant filed certain requests for rulings, but did not request the assessor to report them. The defendant did not request the assessor to report the evidence or any part of it before the assessor filed his report.

On May 14, 1903, the defendant filed a motion to recommit the assessor's report. This motion was heard and denied by *Fessenden*, J.

On October 7, 1903, the defendant filed a motion for a new trial. This motion also was heard by *Fessenden*, J. The defendant contended, and asked the judge to rule, that the plaintiff by continuing to work under the contract after a tender of payment by the defendant waived any breach of contract by the defendant theretofore existing, and was not entitled to recover damages. The judge, after hearing certain evidence and certain testimony given before the assessor on this subject, and, after an inspection of the records in the case in the Superior Court and in the Supreme Judicial Court, declined so to rule, and denied the motion for a new trial.

On October 7, 1903, the plaintiff filed a motion to confirm the assessor's report and that judgment be entered forthwith for the plaintiff. This also was heard by *Fessenden*, J. The defendant contended that in view of the facts set forth in its motion to recommit the assessor's report, and its motion for a new trial, the report as a matter of law should not be confirmed and judgment should not be entered. The judge allowed the plaintiff's motion.

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To the action of the judge upon the three motions above stated the defendant alleged exceptions.

The defendant also filed an appeal from the orders of the Superior Court named above, as follows: "1. From the order overruling the motion of the defendant to recommit the assessor's report. 2. From the order denying the defendant's motion for a new trial in said cause. 3. From the order allowing the plaintiff's motion to confirm the assessor's report and ordering judgment forthwith."

J. T. Pugh, for the defendant.

W. N. Buffum, for the plaintiff.

HAMMOND, J. 1. The motion to recommit the report to the assessor was addressed to the discretion of the judge and his decision thereon is not subject to exception or appeal. If the defendant desired the findings of the assessor to be reviewed by the Superior Court, he should have taken specific objections to them and have requested a report of so much of the evidence as bore upon the points covered by the exceptions. If this had been done, these questions could have been brought to this court. *Carew* v. *Stubbs*, 161 Mass. 294, and cases cited.

2. It does not appear that there was any error in law in overruling the motion for a new trial. The question of liability had been determined already against the defendant (181 Mass. 275) and it was not open to it to raise that question either at the hearing before the assessor or, by a request for a ruling by the court, on a motion for a new trial. *Paddock* v. *Commercial Ins. Co.* 104 Mass. 521.

3. The court had the power to order judgment upon the report of the assessor, and no error in law appears. *Carew* v. *Stubbs*, *ubi supra*, and cases cited.

The result is that the exceptions are overruled and the order for judgment from which the defendant appealed is affirmed.

So ordered.

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MARY E. HOFNAUER *vs.* R. H. WHITE COMPANY.

Suffolk. March 1, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

Negligence, Employer's liability, *Res ipsa loquitur*.

In an action for personal injuries by a saleswoman employed in the department store of the defendant, it appeared, that it was part of the plaintiff's duty to sell medicine chests, that these chests were kept on a shelf two feet and a half wide, sixty feet long and six and one half feet from the floor, supported by posts twelve feet apart and extending about three feet beyond the last post, that there was a perceptible slant of two or three inches at the end of the shelf, that while the plaintiff in the performance of her duties was standing near this end, one of the chests fell and striking her caused the injuries, and that about three months before a similar chest had fallen from the same part of the shelf. It further appeared that during the employment of the plaintiff and when the first chest fell a person was present whose duty it was to tell the saleswoman what to do "if there was anything out of order around the place," and to give directions from time to time, but who was not intrusted with the duty of constructing or repairing the shelves. *Held*, that there was no evidence of the defendant's negligence in maintaining the shelf; *also*, that the condition of the shelf was obvious and if it involved a danger the risk was assumed by the plaintiff; *also*, that there was no evidence of any negligence on the part of the person in charge.

The fact that in a department store a medicine chest falls from a shelf two and a half feet wide with a slant of two or three inches at the end from which it falls, other chests on the same shelf remaining in place and it having been the practice when the chests were taken off to show to customers to put them back if not sold, is not sufficient in itself to constitute evidence of negligence. To make it such evidence the plaintiff must show that causes other than the inclination of the shelf which might have produced the accident did not operate.

TORT against the R. H. White Company, a corporation maintaining a department store in Boston, for personal injuries, with counts at common law and under the employers' liability act as stated in the opinion. Writ in the Municipal Court of the City of Boston dated November 21, 1901.

On appeal to the Superior Court the case was tried before *Pierce*, J., who ordered a verdict for the defendant. The plaintiff alleged exceptions.

J. E. Young, for the plaintiff.

J. Lowell & J. A. Lowell, for the defendant, were not called upon.

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BRALEY, J. This is an action of tort to recover damages for personal injuries suffered by the plaintiff while employed as a saleswoman of the defendant, for which she had been working at the time of the accident during a period of more than two years. It appears to have been a part of her duty to show those who might become purchasers certain medicine chests, that were placed on a shelf which was of a width of two and one half feet, and of the total length of sixty feet, while its height from the floor was six and one half feet. When in position on the side of the room it was supported by posts about twelve feet apart, but one of its ends extended for about three feet beyond the last post. As the plaintiff was standing near this end in the performance of her usual duties one of these chests fell, struck her person, and caused the injuries of which she complains. The uncontradicted evidence shows that about three months before the time when the plaintiff was hurt, a similar chest had fallen from the same part of the shelf, and there was a perceptible "slant" of two or three inches in that end of it, which continued to the day of the accident, and could have been clearly seen by the plaintiff.

It further appeared in evidence that during the time of the plaintiff's service, and when the first chest fell, a person by the name of Muir was present, and that his duty was to "sign slips and tell us what to do if there was anything out of order around the place", and he also gave direction from time to time to the persons employed in the department. He was succeeded by one Bott, who was charged with like duties, but it does not appear that either was intrusted with any care or control of the premises, or required to see that the appliances which may have been furnished by the company were kept in good order and condition and reasonably suitable for use.

The declaration contained three counts, one at common law for an improperly constructed shelf that was in a dangerous and defective condition, one under the employers' liability act for a "defect in the condition of the ways and works connected with and used in the business of the defendant", and which in each instance had not been remedied owing to its negligence, and one declaring on the negligence of some person in the service of the defendant, who was intrusted with and exercising

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superintendence, and it was ruled at the trial in the Superior Court that the plaintiff could not recover, and a verdict having been ordered, and returned, in favor of the defendant, the plaintiff brings her case here on exceptions.

If it be conceded that the plaintiff was in the exercise of due care, it is still incumbent upon her to show some act of negligence on the part of the defendant, and to do this she first relies on the fact that a chest fell from the shelf three months before the time of the accident. But if we give to this incident every possible probative force it does not tend to prove the fact in issue, for the circumstances surrounding its fall are not disclosed, and there is no evidence that it was caused solely by the inclination of the shelf, for its fall may have been attributable to the carelessness of an employee in not replacing it securely after it had been taken down and shown to customers.

The plaintiff, however, relies on the additional fact that on the day of the accident the chest itself fell as supplying sufficient proof to require a submission of the case to the jury, under the familiar principle that where an accident is of such an unusual character it can be said it would not have happened except from the fault of the defendant, and for this reason it may fairly be inferred it would not have occurred here but for its negligence if not otherwise explained.

The mere inclination of the shelf does not seem to have affected the stability of the other chests which apparently remained in place after being once put in position, and it cannot be said under the circumstances disclosed where chests were being taken off, and put back, in the ordinary course of business, that because one of them happened to fall the doctrine invoked becomes applicable, and such an occurrence was of so uncommon a character that of itself it furnished evidence of negligence on the part of the defendant. *Pinney* v. *Hall*, 156 Mass. 225.

If there were other causes besides the fact of the fall of the chest itself, that may have produced such a result, the plaintiff is obliged to go further and eliminate them by showing they did not operate, but instead of doing this she is content to rest her case upon the bald statement of fact that the chest fell and nothing more.

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But the incline of the shelf is shown to have been only from two to three inches at the end, and less than three feet from the post by which at that point it was supported, and it cannot be said in a shelf of this length and width this was so unusual as to lead to the inference of negligence, or that this condition alone caused the chest to fall, for here again it may have been placed so insecurely by the acts of a fellow servant that from some cause not disclosed it fell.

It is not necessary, however, to rest the decision of the case on these two counts solely on this ground, for there is another answer to the plaintiff's contention as it may be inferred that at the time she entered the service of the defendant the shelf was a part of its establishment where she was to work, and on the evidence it is not disputed that the condition of the shelf was open and obvious and continued to be so down to the time when she was injured.

Under such conditions, as there was no concealed danger, she must be held to have assumed any risk of the nature disclosed, and this alone is sufficient to prevent her recovery. *O'Maley* v. *South Boston Gas Light Co.* 158 Mass. 135. *Lamson* v. *American Axe & Tool Co.* 177 Mass. 144. *Langley* v. *Wheelock*, 181 Mass. 474.

An extended discussion of the remaining count is not required as the person alleged to have been acting as superintendent at the time of the accident is not shown to have been intrusted with the duty either of the construction or repair of the shelf, and there is no claim that he set the plaintiff at work in a place where the chest would be likely to fall upon her. *Fitzgerald* v. *Boston & Albany Railroad*, 156 Mass. 293, 295.

Besides, there was no duty resting upon him to inform her of a danger with which she must be held to have been previously acquainted. *Perry* v. *Old Colony Railroad*, 164 Mass. 296, 300.

Exceptions overruled.

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EDWARD P. BROWN *vs.* GOLDTHWAITE FURNITURE COMPANY.

Suffolk. March 1, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Sale, Conditional. *Waiver.*

The provision of St. 1898, c. 545, now incorporated in R. L. c. 198, § 13, that the vendor before taking possession of furniture under a contract of conditional sale "for non-compliance with the terms of such contract . . . shall make a demand in writing for the balance then due, at least thirty days before taking possession," applies only where the breach of contract is default in the payment of money, and does not apply to a retaking of the furniture by the vendor on account of its removal by the vendee in violation of the terms of the contract.

If a contract of conditional sale of furniture contains a provision that the furniture shall not be removed without the consent in writing of the vendor, and the furniture is removed by the vendee without such consent, the sending by the vendor of a copy of the contract of sale to the vendee at the place to which the furniture has been removed can be found to be a waiver by the vendor of his right to retake the furniture on its removal without his consent.

TORT for the alleged conversion of certain household furniture, removed by the defendant for alleged breach by the plaintiff of a condition in a contract of conditional sale called a lease. Writ dated July 1, 1901.

At the trial in the Superior Court before *Hitchcock*, J., it appeared, that the property was delivered originally by the defendant to the plaintiff at No. 4 Alexander Street in that part of Boston called Dorchester, and afterwards was removed by the plaintiff to No. 123 Blue Hill Avenue in that part of Boston called Roxbury, without the knowledge or consent of the defendant before it was so removed. There was put in evidence an instrument purporting to be a copy of the lease which was sent by the defendant to the plaintiff at the address 123 Blue Hill Avenue.

The contract contained the provisions in regard to the removal of the property which are stated in the opinion.

The defendant requested the judge to rule as follows: "If the plaintiff removed the property from No. 4 Alexander Street, Dorchester, without the consent of the defendant in writing he

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thereby forfeited all right to said goods, and to further use of the same, and to all moneys paid, and the defendant would have the right to enter into and upon any premises occupied by him, and remove the goods without notice or demand, and without being deemed guilty of any trespass or wrong, and without being liable for appropriating the property to its own use."

The judge refused to make this ruling and gave other instructions one of which is quoted in the opinion. The jury found for the plaintiff in the sum of $20; and the defendant alleged exceptions.

J. Cummings, for the defendant.

J. A. Coulthurst, for the plaintiff, submitted a brief.

HAMMOND, J. This is an action for the conversion of certain articles of furniture named in a written lease thereof, in the nature of a conditional sale, given by the defendant to the plaintiff. It does not seem to be in dispute that the defendant subsequently took the goods from the plaintiff for an alleged breach of one of the conditions contained in the lease.

The lease provided for the payment of $15 down and a monthly payment of $8 thereafter; that the articles were to be used at "No. 4 Alexander Street in Dorchester," and that the vendee should not remove them or any of them from that place without the written consent of the defendant; and, further, that if the vendee failed to pay the rent thereinbefore stipulated, or if he removed the articles from said place, or sold them, underlet them, or suffered them "to be attached, mortgaged, damaged or injured, . . ." he thereby forfeited all right to the goods and to any further use of them "and to all moneys paid." The title in the goods was to remain in the vendor until the price was fully paid.

One of the rulings made by the court was that "The removal of the goods from No. 4 Alexander Street was at most a default by the plaintiff in the performance of the conditions of the lease, which the defendant could not take advantage of by retaking the goods under the lease, except after a demand in writing, in accordance with Chapter 198, § 13, of the Revised Laws, thirty days at least before so retaking the goods, anything to the contrary in the lease notwithstanding."

The main question is whether the statute provision that thirty

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days before taking possession a statement of the amount due shall be furnished, and a demand for the payment thereof made, by the vendor, applies where the breach relied on is the wrongful removal of the articles.

It seems to have been assumed at the trial that R. L. c. 198, § 13, was in force at the time of the taking, and hence the ruling refers to it. Inasmuch, however, as the writ is dated July 1, 1901, and the Revised Laws were not in force until January 1, 1902, it is plain that the judge really had reference to the statute which in substance was re-enacted in the section mentioned in the instruction given. The statute was St. 1898, c. 545, and we therefore consider the ruling as referring to that.

The legislation upon the subject is to be found in St. 1881, c. 222; Pub. Sts. c. 192, § 13; St. 1884, c. 313, § 2; St. 1892, c. 411; and St. 1898, c. 545. We do not deem it necessary to recite in detail these various statutes. A careful consideration of the language of St. 1898, c. 545, especially when considered in the light of the previous legislation, leads us to the conclusion that the provision for a thirty days' notice and demand applies only where the breach relied upon is default in the payment of money. The instruction therefore was erroneous.

The judge rightly refused to give the instruction requested by the defendant. If the jury believed the evidence tending to show that after the goods were removed from Alexander Street to Blue Hill Avenue the defendant gave to the plaintiff an instrument purporting to be a copy of the lease, sending the same to him at his address at the latter place, they might well have found a waiver by the defendant of the condition of the original lease with reference to removal, so far at least as respected the removal to the latter place.

Exceptions sustained.

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CITY OF CAMBRIDGE *vs.* HERVEY A. HANSCOM & another.

Suffolk. March 2, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Subrogation. Way, Defect in highway. *Commonwealth. Municipal Corporations*, Officers.

Certain judgments were recovered against a city for injuries from a defect in one of its highways, consisting of an excavation made and left unguarded by a contractor laying a water pipe under a contract with the metropolitan water board. The Commonwealth, being liable under St. 1895, c. 488, § 12, to indemnify the city for this loss, paid the amounts of the judgments directly to the judgment plaintiffs. The city then brought an action of tort for the benefit of the Commonwealth against the contractor whose acts and omissions caused the defect. *Held*, that the Commonwealth was subrogated to the rights of the city against the contractor, and could recover the amounts of the judgments in the name of the city although the Commonwealth had discharged the liability of the city by paying the judgments directly.

If a city is sued for injuries from a defect in a highway consisting of an excavation made and left unguarded by a contractor laying a water pipe under a contract with the metropolitan water board, and if the Commonwealth, being liable under St. 1895, c. 488, § 12, to indemnify the city for any judgment recovered against it on account of this defect, undertakes the defence of the action and employs the city solicitor as its counsel, the city solicitor having the right to engage in business outside of and in addition to his work for the city, the counsel fee paid by the Commonwealth to the city solicitor in compensation for his services is paid for its own benefit, and, after the Commonwealth has paid the amount of the judgment against the city and has brought an action in the name of the city against the contractor whose fault caused the defect in the highway, the Commonwealth cannot include such counsel fee in its claim of subrogation to the rights of the city against the contractor.

TORT by the city of Cambridge, for the benefit of the Commonwealth, against the defendants doing business under the name of Hervey A. Hanscom and Company, for the amount of judgments recovered against the plaintiff by one Catherine B. O'Neil and one Eleanor Maloney for injuries from falling into an unguarded trench, dug by the defendants in laying a water pipe through Massachusetts Avenue in Cambridge under a contract with the metropolitan water board and constituting a defect in that highway. Writ dated September 14, 1900.

In the Superior Court the case was heard by *Mason*, C. J.,

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upon agreed facts. He ordered judgment for the plaintiff in the sum of $6,571.93; and the defendants appealed.

It appeared by the agreed facts that the defect causing the injuries for which the judgments were recovered "was caused by acts and omissions for which the defendants are answerable." Under St. 1895, c. 488, § 12, the Commonwealth was liable to indemnify the city for all damages for injuries resulting from any defect caused by the laying of pipes by the metropolitan water board.

In regard to the employment by the Commonwealth of Mr. Pevey, the city solicitor of the plaintiff, it appeared by the agreed facts that the fee of $1,000 paid to Mr. Pevey by the Commonwealth for defending the actions brought against the city of Cambridge in the Superior and Supreme Judicial Courts was a reasonable and proper fee for the services performed. It further appeared that at the time of Mr. Pevey's employment by the metropolitan water board, and during the time he was engaged in defending the actions brought against the city of Cambridge, there was no ordinance, rule or statute prohibiting him from engaging in private practice, or from acting for private clients, and that during his service as city solicitor, and while engaged in the defence of these actions, he had an office in Boston, and acted for many clients other than the city of Cambridge with the knowledge and assent of that city. It also appeared that ever since the institution of the law department of the city of Cambridge it had been the invariable custom and practice on the part of the several city solicitors to engage in business outside of and in addition to their city work, and that this custom and practice had been known and assented to on behalf of the several city councils in electing their several city solicitors and fixing their compensation.

G. W. Buck, for the defendants.

R. A. Stewart, Assistant Attorney General, for the plaintiff.

HAMMOND, J. The judgments against the city of Cambridge established its liability, and there rested upon it the duty of paying them. If it had paid them, then, upon the agreed facts, it would have had a right to recover either against the metropolitan water board representing the Commonwealth, or against the defendants. If it had proceeded against the defendants and

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had recovered from them, that would end the matter because the latter had no right of indemnity against any one. If it had proceeded against the water board representing the Commonwealth, then the latter upon paying would have had an action of indemnity against the defendants, because as between the defendants and the board the former were ultimately liable; and under the well established principles of subrogation the Commonwealth would have been subrogated to the rights of the city against the defendants. *Hart* v. *Western Railroad*, 13 Met. 99. *Wall* v. *Mason*, 102 Mass. 313, 316.

It is urged, however, by the defendants, that the city met with no loss because the judgments were paid, not by it but by the Commonwealth. But this manner of payment can make no difference. To hold that the rights of the Commonwealth were unfavorably affected by its payment of the judgments instead of waiting for the city to pay and then paying the city, is to lose sight of the substance of the transaction. The city of Cambridge was under the weight of the liability established by the judgments, and was called upon to discharge them. It was the duty of the Commonwealth to relieve the city from that load. The money was paid by it, not in the discharge of any duty due from it to the judgment creditors, but in the discharge of its duty to indemnify and protect the city, and the simple fact that the payment was made directly to the judgment creditors cannot make the transaction any the less one of indemnity. So far, therefore, as respects the amount of the judgments, the Commonwealth is subrogated to the right of the plaintiff against the defendants.

But as to the counsel fee of $1,000 paid by the Commonwealth to Mr. Pevey, the case is different. It is plain upon the agreed facts that the Commonwealth assumed the defence of the cases and hired Mr. Pevey as its counsel, and that the above sum was paid to him as such and not as city solicitor of Cambridge. It is true that he was the general solicitor of Cambridge which paid him an annual salary, but he was not under the exclusive employ of the city. He had the right to engage in business outside of his work as city solicitor, and such always had been the custom of his predecessors. Under these circumstances he was employed by the Commonwealth. It is the same as though

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some other person than he had been employed. The city of Cambridge never was under any obligation to him, or to anybody else, to pay this fee. This sum was not, nor was it ever intended to be, any part of the money to be paid by the city to him as city solicitor, and in paying it the Commonwealth discharged no obligation or liability of the city. If it be said that, in so far as Mr. Pevey acted as city solicitor in these cases, it may be assumed that a part of his official salary went to pay for these services, the answer is that this fee does not cover what he did as city solicitor, but what he did as counsel for the Commonwealth, under his employment as such. Since the city never paid this fee and never was under any obligation contingent or absolute to pay it, the doctrine of subrogation is not applicable, and the city cannot maintain an action to recover it for its own use or for that of any other party. "There can be no subrogation unless there is something to be subrogated to." Morton, J. in *Skinner* v. *Tirrell*, 159 Mass. 474.

Judgment reversed and case remanded to Superior Court, with instructions to enter judgment only for the amounts paid on the judgments with interest.

NETTIE E. HIGGINS *vs.* JOHN SHEPARD & others.

Suffolk. March 4, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Practice, Civil, Exceptions. *Witness*, Cross-examination. *Words*, "I may have."

The admission of immaterial evidence furnishes no ground of exception unless the excepting party was harmed by its admission.

Where a witness is asked on cross-examination whether he did not make a certain statement in testifying in another court and answers "I don't know. I may have", the words "I may have" do not necessarily or even probably mean that his best recollection is that he so testified, and the answer properly may be understood to be a statement that the witness does not know and has no recollection about his former testimony.

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CONTRACT, by a woman employed as a buyer in the underwear department of the dry goods store of the defendants, for a balance of salary, alleging that the plaintiff was employed for a year at a salary of $800, and that the defendants discharged her without cause before the expiration of the year. Writ dated July 18, 1898.

This case was before the court at a previous stage as reported in 182 Mass. 364. By the decision there reported the defendants' exceptions were sustained after a verdict for the plaintiff. At a new trial in the Superior Court before *Lawton*, J., the jury returned a verdict for the plaintiff in the sum of $262.61; and the defendants alleged exceptions.

J. J. Higgins, for the defendants.

R. Levi, for the plaintiff.

HAMMOND, J. So far as respects the question of liability, the only matter really in dispute was whether the plaintiff was hired for an absolute term of one year, or for an indefinite term. After Shepard, one of the defendants, had testified on cross-examination that his firm never made with their employees contracts for an absolute term, Cole, another defendant, was asked upon cross-examination whether he had not testified in another court that one Murphy, the predecessor of the plaintiff in the business for which she was hired, "had a contract from year to year." The defendants seasonably objected to this question on the ground that it was immaterial. The objection was overruled, and, subject to the exception of the defendants, the witness was allowed to answer "I don't know. I may have."

As this evidence was immaterial to the issue, it was inadmissible. But the rule is that the admission of such evidence furnishes no ground of exception unless it be prejudicial to the excepting party. It will be observed that the answer was a statement in substance that the witness did not know whether he had testified in another court that Murphy was hired for a year; and the phrase "I may have" was not necessarily or even probably intended as a statement that his best recollection was that he had so testified, but rather that he had no recollection whatever about it. In fine, the answer seems to be a statement that he did not know and had no recollection about his former testimony. Moreover on further cross-examination he

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testified positively that Murphy was not hired for any definite term. No exceptions were taken to the instructions under which the case was submitted to the jury; and, while in the charge no allusion was made to the evidence excepted to, we must assume that the jury were fully and properly instructed. Under the circumstances it is not made to appear that the defendants were prejudiced by the answer of the witness Cole.

Exceptions overruled.

THEODORE H. TYNDALE, administrator, *vs.* EBEN C. STANWOOD.

Norfolk. March 7, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Real Action. Executor. Practice, Civil.

Under R. L. c. 146, § 17, an administrator cannot maintain a writ of entry to recover land fraudulently conveyed by his intestate which he alleges that he is licensed to sell as administrator, when an appeal has been taken from the decree of the Probate Court granting him the license to sell the land, and exceptions to the order of a single justice of this court confirming the decree of the Probate Court and to rulings of the single justice have not been passed upon by the full court, and, even if the order of the single justice is affirmed by the full court while the writ of entry is pending, the demandant cannot recover in his action thus prematurely brought.

Discussion by HAMMOND, J. of the history and effect of exceptions in this Commonwealth.

WRIT OF ENTRY, dated October 15, 1902, under R. L. c. 146, § 17, for a certain parcel of land in Quincy with the buildings thereon, which the plaintiff alleged that he was licensed to sell as administrator of the estate of Isabella S. Whicher, and which he alleged had been fraudulently conveyed by his intestate to the tenant.

At the trial in the Superior Court before *Harris*, J., the demandant, among other requests, asked the judge to rule as follows: "An appeal having been taken from the decree of the Probate Court, licensing the sale of the property in question, 'all proceedings in pursuance of the act appealed from' were

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'stayed until the determination thereof by the Supreme Court of Probate.' As such determination was not made until after the commencement of this action, the same was prematurely brought."

The judge refused to rule as requested and submitted the case to the jury on the issue whether the conveyance by the intestate was fraudulent. The jury found for the demandant; and the tenant alleged exceptions.

R. L. c. 146, § 17, is as follows: "Section 17. If an executor or administrator is licensed to sell land which has been fraudulently conveyed by the deceased or is fraudulently held by another person for him, or land to which the deceased had a right of entry or of action or of which he had a right to a conveyance, he may, within one year after such license, sell the land without first obtaining possession thereof by entry or action, or he may without a formal entry bring an action to obtain possession by virtue of such license, demanding the land as executor or administrator, and may sell the same within one year after possession is obtained."

In *Tyndale* v. *Stanwood*, 182 Mass. 534, is reported the decision of this court, made on January 26, 1903, ordering that the decree of a single justice be affirmed, affirming the decree of the Probate Court granting leave to the demandant to sell the real estate in question.

S. H. Tyng & J. P. Prince, for the tenant.

R. M. Morse, (*C. H. Hanson* with him,) for the demandant.

HAMMOND, J. This is a writ of entry brought under R. L. c. 146, § 17, by the administrator of the estate of Isabella S. Whicher, lately deceased, to obtain possession of certain land which is alleged to have been fraudulently conveyed to the tenant, and which the demandant declares he has been licensed to sell. The chief question is whether at the time the action was brought there was any operative license to sell.

The facts material to this question may be briefly stated. After prolonged litigation, (see 173 Mass. 517, 176 Mass. 547, 179 Mass. 390,) a claim in favor of a national bank was finally established against the estate. Whereupon the administrator represented that the estate was insolvent, commissioners were appointed before whom this claim was proved, the administrator

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filed in the Probate Court a petition for leave to sell the land in question to pay debts and charges of administration, and on April 16, 1902, the court entered a decree granting the license. From this decree an appeal was taken and entered in this court as the Supreme Court of Probate, and a hearing was had before a single justice, who ordered a decree affirming the decree of the Probate Court, which decree thus ordered was transmitted to and filed in the Probate Court on the same day in which, though before, the present action was brought. Exceptions were taken by the appellants, one of whom was this tenant, to various rulings made at the hearing before the single justice, and also to the order affirming the decree of the Probate Court. The record before us states that these exceptions were all overruled by the full court by its rescript dated and filed January 26, 1903. An examination of the papers in that case, including the written opinion of the full court, however, shows that while the exceptions were considered and found unsound, the language of the rescript was simply "Decree affirmed."

It therefore appears that, at the time this present writ issued, exceptions taken at the hearing before the single justice and also to his order affirming the decree of the Probate Court, although not yet formally allowed, were still pending; and the question is whether under this state of things there was any operative license at the time the writ issued.

While the appeal from the Probate Court did not bring to this court the whole case, and did not invalidate anything there done under the decree prior to the appeal if the decree was finally affirmed by this court, yet it brought here the whole question, including both law and fact, whether the decree was wrong for any of the reasons assigned by the appellants, and suspended its operation until the determination of the appeal by this court. *Gale* v. *Nickerson*, 144 Mass. 415. R. L. c. 162, § 16. It therefore becomes necessary to consider the effect of the proceedings in this court at the stage in which they were at the time this writ issued.

At common law a writ of error, so far as based upon an error at law, lay only when the error was apparent on the record. Inasmuch as rulings made during the trial did not so appear, St. 13 Edw. I. c. 31, was passed, which allowed a party to state

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in writing his exception to any rulings, including those not otherwise theretofore made matter of record, which, when signed and sealed, became a part of the record; and the ruling thus excepted to could then be revised on writ of error. See *Cogswell* v. *Dolliver*, 2 Mass. 217, for an instance of this. It is obvious that under this practice the case went to judgment notwithstanding the exceptions, and the proceedings, if stayed at all, were not stayed by the bill of exceptions but by the writ of error. But to avoid the inconvenience of this practice, a more summary method of raising questions of law was early adopted in this State, upon which our present practice is based. Authority for this summary method of raising and disposing of questions of law is first found in the statute which authorized terms of this court to be held by a single justice. It provided that whenever the court should be held "by any two or one of the justices thereof, it shall be lawful for any party, thinking himself aggrieved by any opinion, direction or judgment of the said justices or either of them, in any action or process of a civil nature, to allege exceptions to the same . . .; and such exceptions being reduced to writing, in a summary mode, and presented to the court before the adjournment . . . without day, and found conformable to the truth . . . shall be allowed and signed by the presiding justice . . ., and thereupon all such actions or process, in or upon which judgment shall not have been rendered at the time of allowing such exceptions, shall be continued to" the term held by the full court, and also "such actions or process wherein exceptions shall be alleged to the final judgment of court thereon, shall likewise be continued in the same manner, and execution thereon shall be stayed, but without prejudice to any attachment, made on the original writ . . . provided, however, that no trial by jury shall be delayed or prevented, by the making or filing of exceptions to the opinion or judgment of the court, upon any dilatory plea, or upon any question of law arising during the trial." Then follows a provision for the entry of judgment and award of execution in cases where the exceptions appear to be frivolous, immaterial, or intended for delay. St. 1803, c. 94, § 5. The next year this statute was repealed, and for it was substituted St. 1804, c. 105, which contained substantially the same provision. This method of carry-

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ing questions of law to this court was afterwards extended so as to apply to proceedings in the various courts of common pleas, (St. 1813, c. 173, § 2, St. 1817, c. 185, § 5, St. 1820, c. 79, § 5,) and in the Superior Court.

From time to time changes have been made in the details of this system, but in substance and effect it remains as outlined in the statute where it first appears. The plain purpose of this method was to have questions of law settled before final judgment, or, where the exception was to the judgment, before issue of the execution; and that radical feature has been constantly maintained except where the exceptions are frivolous, immaterial, or intended for delay. This feature appears in R. L. c. 173, § 79, in this form: "The trial of questions of fact shall proceed although exceptions have been filed and allowed therein, and such further proceedings shall be had as the court orders; but judgment shall not be entered unless the exceptions are adjudged immaterial, frivolous or intended for delay."

Under this system, exceptions may be allowed and entertained to decisions of justices of this court sitting in equity or for the hearing of appeals from the Probate Court. *Dorr* v. *Tremont National Bank*, 128 Mass. 349, and cases cited. In such cases the general radical feature of the system remains, and, where the exceptions are taken to the rulings made at the hearing, no final order or decree should be passed before the expiration of the time for filing the exceptions or until the determination of the questions of law thereby raised. *Prescott* v. *Prescott*, 175 Mass. 64. *Green* v. *Crapo*, 181 Mass. 55. *Goff* v. *Britton*, 182 Mass. 293. In the case before us no final decree affirming the decree of the Probate Court could properly have been made until after the expiration of the time for filing a bill of exceptions, or (if filed) until the determination of the questions of law therein raised. In legal effect the decree made by the single justice can be regarded only as an order for a final decree of affirmation of the decree of the Probate Court. But even if it were otherwise and the order would be construed as a final decree, still the exception taken to the decree would stay its operation until the exception taken to it was disposed of. Such a view is in accordance with one of the leading features of this system of raising questions of law, as established by the statute

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in which it was first authorized, and ever since continued. In either event, therefore, there does not appear to have been in force at the time this writ was sued out, any license authorizing the demandant as administrator to sell this estate. The demandant has called our attention to *Commonwealth* v. *Gloucester*, 110 Mass. 491, where it was adjudged in a criminal case that judgment of guilty could be rendered by the court after exceptions to an order overruling a demurrer to the indictment had been taken and remain undisposed of, but a reading of that case shows that the decision is in no respect inconsistent with the views above expressed.

It is urged, however, by the demandant, that even if the license was not operative at the time the writ issued, inasmuch as the exceptions were held unsound and the decree granting a license was finally affirmed by the full court, the affirmation relates back to the time of the appeal, and validates intervening action. While it is true that an order or decree of the Probate Court is not vacated by an appeal but is simply suspended, and upon being affirmed by the Supreme Court takes effect and operates as a decree of the Probate Court and any intermediate action which has been had under the decree is valid, (*Gale* v. *Nickerson, ubi supra,*) still it is obvious that such intermediate action must be such as, at the time it is taken, is permitted by law, as action taken prior to the appeal. Where the statute declares a decree suspended, there can be no legal action under it. *Arnold* v. *Sabin*, 4 Cush. 46. The time of suspension must be a time of inaction, as well with reference to things not yet undertaken as those partially performed. No other interpretation would give due effect to the suspension or be consistent with the due and orderly administration of the law.

It follows that the demandant failed to show so far as material to this action the license necessary to its maintenance, and the tenant was entitled to the ruling that the action was prematurely brought.

Exceptions sustained.

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FREDERICK J. WHITE *vs.* CITY OF BOSTON.

Suffolk. March 7, 8, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Evidence, Competency, Self serving statements. *Witness*, Cross-examination. *Practice, Civil*, Exceptions.

On a petition for the assessment of damages for the taking of land by a board of park commissioners, the petitioner was allowed to show that he bought two undivided thirds of the land from his two brothers and to prove what was said when that trade was made, but was not allowed to show an understanding of his brothers and himself, not expressed, that the land contained a number of square feet less than it subsequently was found to contain, and that he bought the land for seventy-five cents a square foot although he paid less than that rate by the actual measurement. It appeared that five years had elapsed and that the brothers had made no claim on the petitioner founded on the alleged mistake of fact. *Held*, that the exclusion was right.

Where, on a petition for the assessment of damages for the taking of land, the presiding judge has limited each party to seven expert witnesses, it is right for the judge after the petitioner has examined his seven witnesses to prevent the petitioner from extracting an expert opinion on the cross-examination of a witness called by the respondent not as an expert.

On a petition for the assessment of damages for a taking of land by a board of park commissioners, the petitioner cannot put in evidence letters from himself to the commissioners written after the land was taken, and it does not matter that one of the letters was written before the petitioner knew of the taking, if when he sent the letter he knew of the taking and intended the letter to affect his claim.

No exception lies to the exclusion of a question based on the assumption of a fact which is not in evidence.

No exception lies to a refusal to give instructions which are given in substance.

PETITION, filed August 31, 1900, for the assessment of damages for the taking on September 14, 1899, by the board of park commissioners of the city of Boston of a lot of land containing one hundred and twenty-nine thousand seven hundred and forty square feet, on the westerly side of Chestnut Hill Avenue near the Chestnut Hill Reservoir in that part of Boston called Brighton.

In the Superior Court the case was tried before *Fox*, J. The jury returned a verdict for the petitioner in the sum of $118,511; and the petitioner alleged exceptions, raising the questions stated by the court.

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C. F. Choate, Jr., (*A. F. Hayden* with him,) for the petitioner.

T. M. Babson, for the respondent.

LORING, J. 1. In support of his first exception the petitioner has argued that he was precluded from proving that he bought two undivided thirds of the land for seventy-five cents a foot. That is not so. He was allowed to prove what was said when the trade was made by which he bought these two thirds of this lot. What the judge ruled was that the "secret understandings" of the petitioner who bought and of his brothers who sold were not admissible. The ruling was right, even if we assume in favor of the petitioner that what he was ready to show was that the parcel of land in question was assumed by these brothers to contain one hundred and twenty thousand in place of one hundred and twenty-nine thousand seven hundred and forty square feet. If there was such an assumption, it would have had no greater effect than to entitle the two brothers to avoid the sale on the ground that it was made under a mutual mistake of fact. But it was not pretended that the two brothers who sold had put forward such a claim in the five years which had elapsed between the purchase and sale and the trial. Without any claim having been put forward founded on this mutual mistake of fact, the existence of the mutual mistake was immaterial, and it is not necessary to consider whether the fact that there was a mutual mistake would have had any other significance than to make inadmissible this sale which the petitioner was putting in evidence.

2. It is too plain for discussion that the order of the presiding judge limiting each party to seven expert witnesses prevented the petitioner (who had already put his seven on the stand) from extracting on cross-examination an expert opinion from a witness called by the respondent as an ordinary and not as an expert witness.

3. The letters of the petitioner sent to the park commissioners after the land was taken were properly excluded. Although the first was written before the petitioner knew his land had been taken, his purpose and his only purpose in sending it after he had notice of it was that it might be material (as he says in the postscript) "in regard to a settlement of any part of my claims." A party cannot make evidence for himself.

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4. The next exception is to the exclusion of this question put to the witness Corthell with regard to one Rogers: "Does he get any other compensation or any other return for what he does for you, or does he get any compensation in any way for what he does for you, except as he gets it out of the consideration you show him in your transactions with him?" There was no evidence that Rogers got any compensation by way of consideration shown him in the transactions with him by Corthell and his land company, and the question was properly excluded as based on an assumption which was not in evidence.

5. The other exception was "to the refusals of the court to give the instructions requested, except so far as covered by the charge." The rulings requested were all given in substance in the charge.

Exceptions overruled.

CHARLES J. McCARTHY *vs.* JOHN PEACH.

Suffolk. March 8, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Evidence, Self serving statements.

A plaintiff having testified that he had a certain conversation with the defendant by telephone, a witness for the plaintiff may be allowed to testify what he heard the plaintiff say as a part of that conversation, although the witness had no personal knowledge that the plaintiff was talking with the defendant or that he was talking with any one. Whether the conversation testified to by the plaintiff took place as alleged or was fictitious is a question of fact for the jury.

MORTON, J. This is an action to recover a balance alleged to be due to the plaintiff from the defendant for services rendered in securing a customer for an express business in Salem. There was a verdict for the plaintiff, and the case is here on the defendant's exceptions.

The only question is whether a witness for the plaintiff properly was allowed to testify to what he heard the plaintiff say as a part of an alleged conversation with the defendant over the telephone, — the plaintiff being in Boston and the defendant in Chelsea, and the witness being in the presence and hearing of the plaintiff.

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The witness had no personal knowledge with whom the plaintiff was talking, and did not hear anything that was alleged to have been said by the defendant, and did not know that the defendant heard anything that the plaintiff said. At the argument of the case it was admitted by counsel for the defendant that the plaintiff testified that the conversation was with the defendant. We think that the evidence was rightly admitted. The analogies furnished by conversations between parties through an interpreter, and conversations in a loud tone by one party and a whisper by the other are not altogether complete. In such cases a third party who testifies to more or less of the conversation, as the case may be, is in the presence of the persons whose conversation he undertakes to repeat, and therefore has personal knowledge in respect to the parties to the conversation, though he may not hear or understand all that is said by the principals. In the present case the witness had no personal knowledge as to the identity of the other party to the alleged conversation, or that there was any other party, or, if there was, that he heard what the plaintiff said. It is not contended that the mere fact that the conversation was over a telephone rendered what the witness testified to incompetent. *Lord Electric Co.* v. *Morrill*, 178 Mass. 304. The evidence that was admitted cannot be regarded as hearsay evidence or declarations made by the plaintiff in his own interest, simply because the witness did not know of his own knowledge that the other party to the alleged conversation was the defendant, or that there was any other party, or that the defendant heard what was said. If the alleged conversation took place, as the plaintiff testified that it did, then what the plaintiff said was admissible as a part of it. Whether it did take place as alleged or was fictitious was a question of fact for the jury. It could not be ruled as matter of law that there was no evidence of a conversation between the plaintiff and the defendant of which what was testified to by the witness constituted a part. See *Miles* v. *Andrews*, 153 Ill. 262, 267; *Sullivan* v. *Kuykendall*, 82 Ky. 483; *Oskamp* v. *Gadsden*, 35 Neb. 7; *Wolfe* v. *Missouri Pacific Railway*, 97 Mo. 473.

Exceptions overruled.

E. C. Jenney, for the defendant.

S. R. Cutler, for the plaintiff, was stopped by the court.

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OREN P. WALKER *vs.* GEORGE A. RUSSELL & others.

Middlesex. March 8, 9, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Frauds, Statute of. Deceit. Evidence.

The provision of R. L. c. 74, § 4, requiring a writing signed by the party to be charged, to charge a person upon a representation "concerning the character, conduct, credit, ability, trade or dealings of any other person," applies only to representations made to induce the plaintiff to enter into a transaction which will result in a debt due to the plaintiff from the third person.

Oral false and fraudulent representations as to the financial credit of a corporation made to induce the plaintiff to subscribe for shares of the corporation and pay for them in cash are actionable. *Wells* v. *Prince*, 15 Gray, 562, distinguished.

In an action for false and fraudulent representations as to the financial credit of a corporation whereby the plaintiff was induced to subscribe for its shares, if it appears that the corporation suffered no accident or disaster between the time of the representations and the filing of a bill in equity against it to foreclose a mortgage on its property and for the appointment of a receiver, the plaintiff properly may be allowed to put in evidence the record of the suit in equity as bearing on the value of the shares.

TORT, for alleged false and fraudulent representations whereby the plaintiff was induced to purchase certain shares of the Basin and Bay State Mining Company, a corporation organized under the laws of the State of Montana and owning a copper mine and smelting works at Basin in that State, which shortly after the purchase of the shares by the plaintiff went into the hands of a receiver. Writ dated April 11, 1901.

At the trial in the Superior Court before *De Courcy*, J., the jury returned a verdict for the plaintiff in the sum of $10,850; and the defendants alleged exceptions, raising the questions stated by the court.

G. R. Nutter, (*J. G. Palfrey* with him,) for the defendants.

C. F. Choate, Jr., for the plaintiff.

LORING, J. This is an action to recover $11,000 paid by the plaintiff to the Basin and Bay State Mining Company, a Montana corporation, for one hundred new shares in its capital stock issued by said corporation to him. The plaintiff's evidence tended to show that he was induced to subscribe to and pay

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for these shares of stock by the following representations which were made by the defendants, to wit: That the corporation owned a gold mine free and clear from all incumbrances; that all bills due from the corporation were paid, and that it "positively owed nothing"; that there was from $60,000 to $65,000 surplus in the treasury; that the corporation paid no salaries except to the men at the works, and no commission for selling shares of the capital stock; and that the company's operations had resulted in a net return of twenty-five per cent and over per ton. There was also evidence that each and all of these representations were false and known by the defendants to be false; that the plaintiff, relying on them, subscribed to and paid for one hundred shares at $110 a share; and finally, that the stock was worthless and the plaintiff's money was wholly lost to him.

The defence set up was that these representations were representations "concerning the character, conduct, credit, ability, trade or dealings" of another person within R. L. c. 74, § 4.

The presiding judge ruled "that the provisions of the Revised Laws, c. 74, § 4, had no application to payments for treasury stock under the circumstances shown by the evidence in the case, and ruled that upon all the evidence, the said provisions of the Revised Laws had no application to the case." The case is here on an exception to that ruling.

We are of opinion that the ruling was right.

The original act (of which R. L. c. 74, § 4, is a re-enactment) is § 5 of St. 1834, c. 182. The other sections of that act have no bearing upon the meaning of § 5, the section now in question. The whole act (including the section in question) was originally taken almost word for word from five of the eight sections of Lord Tenterden's act, 9 Geo. IV. c. 14, passed in 1828. The section in question was taken from § 6 of that act, word for word, with this exception: In the English act the clause succeeding that in substance stated above is "to the intent or purpose that such other person may obtain credit, money, or goods upon." In Massachusetts, St. 1834, c. 182, § 5, the word "thereupon" is substituted for the word "upon," which makes that sentence grammatical. It was pointed out in *Lyde* v. *Barnard*, 1 M. & W. 101, 110, 115, 116, 123, that the corresponding sentence in the English act was not grammatical. The true explanation of

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the word "upon" being in the English act was considered in that case, Lord Abinger expressing the opinion that the word "upon" was originally "thereupon," a conclusion which had been adopted in the Massachusetts act two years before.

In determining the effect to be given to this section of Lord Tenterden's act, the most material consideration is the object which Parliament had in its enactment. The object of the enactment was to extend to a defendant in case of an attempt to charge him with the debt of another person by parol evidence of a false representation as to the solvency of that third person, the same protection that is given to him by the fourth section of the statute of frauds (29 Car. II. c. 3), in case of an attempt to charge him with the other's debt by parol testimony of a contract guaranteeing the debt. The occasion for Lord Tenterden's act was the practice introduced by *Pasley* v. *Freeman*, 3 T. R. 51, decided in 1789. In that case it was decided that a defendant could be charged with another's debt if he had fraudulently represented that other to be solvent, and at common law such a representation could be proved by parol. Parliament thought that the danger of injustice from allowing a disappointed creditor to charge a defendant with the debt due him from a third person by parol testimony of a fraudulent representation as to the solvency of that third person was such that this act was passed providing that no such action should be maintained unless the representation was made in writing signed by the party to be charged. See *Lyde* v. *Barnard*, 1 M. & W. 101, 103, 114, 117; *Williams* v. *Mason*, 28 L. T. (N. S.) 232, 233; *Cook* v. *Churchman*, 104 Ind. 141, 148; *Bush* v. *Sprague*, 51 Mich. 41, 47.

To pass to our own act and our own decisions: The typical case which the Legislature had in mind in enacting St. 1834, c. 182, § 5, was where the plaintiff is induced to extend a credit to the third person by representations made by the defendant as to his "character, conduct, credit, ability, trade or dealings." The case where a plaintiff is selling his goods to a third person and is induced to take the note of that third person on time in payment for them, relying on the defendant's representation as to his credit, is an example. *Kimball* v. *Comstock*, 14 Gray, 508. *McKinney* v. *Whiting*, 8 Allen, 207. *Bates* v. *Youngerman*,

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142 Mass. 120. See also *Stannard* v. *Kingsbury*, 179 Mass. 174; and see *Haslock* v. *Fergusson*, 7 Ad. & El. 86. The case where the plaintiff is induced by representations of the defendant to indorse the note of a third person for the third person's accommodation, is another example. *Mann* v. *Blanchard*, 2 Allen, 386. *Clydesdale Bank* v. *Paton*, [1896] A. C. 381. In such a case the plaintiff is induced to extend a credit to the third person.

Whether a particular representation is or is not within the statute does not depend alone upon what is said, but depends also upon the purpose for which the representation is made. For example, it was assumed in *Medbury* v. *Watson*, 6 Met. 246, that a representation that a third person had paid $4,000 for a saw mill bought by the plaintiff for $4,000 paid in cash in reliance upon that representation, was not within the statute upon its being decided that no change was made in the effect of the statute when the final clause of the original act was omitted in the re-enactment of it in the Revised Statutes, to wit: "to the intent or purpose that such person may obtain credit, money or goods thereupon." On the other hand a representation that the third person owned a specified piece of property, which is not in form a representation concerning his "character, conduct, credit, ability, trade or dealings," was held to be within the statute when made to induce the plaintiff to accept the note of a third person in place of cash for goods sold to him, if it was "made concerning the credit, ability, trade or dealings of" that other. *Hunnewell* v. *Duxbury*, 157 Mass. 1. *Cook* v. *Churchman*, 104 Ind. 141. It would not be contended that such a representation was within the statute if made with reference to a sale of that property to be paid for in cash.

Representations of fact bearing upon the value of property sold are ordinarily not such that they can be described as representations "concerning the character, conduct, credit, ability, trade or dealings" of a third person who owns the property in question and is undertaking to sell it to the plaintiff. But representations as to the solvency of a third person seeking to obtain a credit from the plaintiff ordinarily would be so described. Sometimes representations as to value are such as to come within the above description. The representations in *Medbury* v. *Wat-*

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son, namely, that the third person had paid $4,000 for the saw mill he was selling to the plaintiff, fairly could be termed a representation concerning one of the "dealings" of the third person, and the representations in the case at bar fairly could be termed representations concerning "the credit, ability, trade or dealings" of the mining company. But it could not have been the intention of the Legislature to make a distinction between representations made to induce a belief as to the value of property sold for cash, when they happened to take that form, and representations made for that purpose made in the usual form, and to require them to be proved by a writing signed by the party to be charged in the former case and not in the latter.

For these reasons we are of opinion that representations "concerning the character, conduct, ability, trade or dealings of any other person" within R. L. c. 74, § 4, must be limited to representations made to induce the plaintiff to enter into a transaction which will result in a debt due to the plaintiff from the third person; and that representations as to the financial credit of a corporation made to induce a plaintiff to subscribe to the shares of the corporation to be paid for in cash are representations of fact bearing upon the value of the shares and are not representations within R. L. c. 74, § 4.

The contention made here by the defendant probably never would have been put forward had it not been for the terms used in the opinion in *Wells* v. *Prince*, 15 Gray, 562. That was a case where an insurance broker, to induce the plaintiff to take out a policy in the Keystone Insurance Company, falsely represented it to be financially strong. The plaintiff, relying on the representation, took a policy from that company, suffered a loss on the property insured, and was unable to collect the amount due from the company. The result of the transaction in that case between the plaintiff and the third person (the insurance company) was a debt due to the plaintiff, contingent on the property insured being damaged by fire, and for that reason the representation was within the statute. That is a very different thing from a representation of the pecuniary condition of the company to induce the plaintiff to subscribe to and pay for stock to be issued to him by the company. But in the opinion in that case it is said that the representation was within the

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statute because made "with the intent of inducing the plaintiffs to make a contract of insurance with the Keystone Insurance Company, and that by means of that contract the insurance company might obtain the money of the plaintiffs, as the premium for such insurance." This language includes a case where the plaintiff subscribes to and pays for stock to be issued to him by the company. The defendants also rely on the dissenting opinion of Chief Justice Graves in *Bush* v. *Sprague*, 51 Mich. 41 (in which Cooley, J. stated *obiter* that he concurred); on *Hubbard* v. *Long*, 105 Mich. 442, 449, where *Bush* v. *Sprague* is cited with approval; on *Heintz* v. *Mueller*, 19 Ind. App. 240, and to a dictum in *Ball* v. *Farley*, 81 Ala. 288. But after a careful consideration of these cases, we are of opinion, for the reasons already stated, that they should not be followed.

The defendants also took an exception to the admission in evidence of the record of a suit to foreclose a mortgage on the property of the corporation, which was outstanding and in force at the time the representations here complained of were made. In this suit a receiver was appointed. The representations were made in July, 1898, and May, 1899, and the plaintiff subscribed for the one hundred shares in question May 22, 1899. The bill to foreclose was filed in February, 1900. There was evidence "that there was no change in the condition of the company's property, and that it suffered no accident or disaster between the time such representations were made and the time that the suit for the appointment of a receiver was instituted." This made it proper for the presiding judge to admit the record as evidence upon the value of the stock. *Whiting* v. *Price*, 172 Mass. 240.

Exceptions overruled.

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EDWIN S. GEORGE *vs.* SAMUEL W. GEORGE & another.

Middlesex. March 9, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Trust, Precatory. *Evidence*, Extrinsic affecting writings, Declarations of deceased persons. *Devise and Legacy.*

A testatrix devised and bequeathed all her property to a certain nephew, who had come to live with her and had taken care of her property on a promise from her that she would give him by will the principal portion of her estate. After the gift to the nephew the will proceeded as follows: "I make this disposition of my estate as I have heretofore expressed to my said nephew my desires concerning the division and disposition of my estate and I have full confidence that he will respect my wishes and will carry them out so far as possible. I request him to make testamentary disposition of such portion of my estate as may call for the same in his judgment. I understand this request has no legal effect, and rely wholly upon the confidence I have in my said nephew." *Held*, that the word "request" in the sentence last quoted did not refer merely to the word "request" in the sentence immediately preceding, but that the sentence last quoted qualified also the sentence in which the testatrix expressed full confidence that her nephew would respect her wishes and carry them out so far as possible, and that in view of the relation of the parties no precatory trust was created.

To determine whether the language of the will of a woman leaving all her property to a certain nephew creates a precatory trust, evidence properly may be admitted that eleven years before the will was made the nephew was asked by the testatrix to leave his home in another city, to take charge of her property and to make his home with her, under a promise "that if he did so she would at her decease give to him the principal portion of her estate", this agreement being a part of the relations existing between the testatrix and her nephew.

In a suit in equity to establish a precatory trust under a will by which a testatrix left all her property to a certain nephew, who had come to live with her and had taken care of her property on a promise from her that she would give him by will the principal portion of her estate, the defendant under R. L. c. 175, § 66, may introduce declarations of the testatrix that the value of her real estate had greatly depreciated, that her personal expenses, owing to her sickness, had greatly increased so that her personal estate was diminishing rapidly, that she realized that it would diminish still more rapidly if she should live long in her present condition of health, and that her real estate had depreciated a great deal.

BILL IN EQUITY, filed June 8, 1902, to establish a precatory trust under the will of Mehitable W. Blodgett, who left all her property to the defendant Samuel W. George upon the terms therein stated, the plaintiff being a nephew and the defendants a nephew and a niece of the testatrix and the plaintiff and

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defendants being all of the heirs at law and next of kin of the testatrix.

The case came on to be heard before *Loring*, J., who at the request of the parties reserved it upon the pleadings and an agreed statement of facts for determination by the full court, such decree to be entered as equity and justice might require.

The will of Mehitable W. Blodgett was as follows:

"Know all men by these presents, that I, Mehitable W. Blodgett of Haverhill in the Commonwealth of Massachusetts, widow, being of sound and disposing mind and memory do hereby make this my last will, hereby revoking all former wills by me at any time heretofore made.

"I hereby constitute and appoint my nephew Samuel W. George, the sole executor of this will and I respectfully pray the honorable judge of probate to exempt him from furnishing any sureties on his official bond.

"After the payment of all my debts and funeral charges and the expenses of administration upon my estate I give, bequeath and devise all the rest, residue and remainder of my estate both real and personal unto my said nephew Samuel W. George; to have and to hold the same unto him, his heirs and assigns forever.

"I make this disposition of my estate as I have heretofore expressed to my said nephew my desires concerning the division and disposition of my estate and I have full confidence that he will respect my wishes and will carry them out so far as possible.

"I request him to make testamentary disposition of such portion of my estate as may call for the same in his judgment.

"I understand this request has no legal effect, and rely wholly upon the confidence I have in my said nephew.

"In witness whereof I hereunto set my hand and declare this to be my last will in the presence of the witnesses whose names are subscribed below, this 28th day of July 1899."

Here followed the signature of the testatrix with an attesting clause followed by the signatures of three witnesses.

F. T. Benner, for the plaintiff.

E. B. Fuller, (*C. H. Poor* with him,) for the defendant Samuel W. George.

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LORING, J. We agree with the plaintiff as to the question on which the decision of this case turns. But we do not agree with him as to the answer which must be given to the question. In our opinion the testatrix did not intend that the nephew should be under any obligation to carry out the wishes she had expressed to him, but did intend that he was to be at liberty to disregard them.

The plaintiff's argument is that the paragraph "I understand this request has no legal effect, and rely wholly upon the confidence I have in my said nephew," relates only to the paragraph next preceding it, namely, "I request him to make testamentary disposition of such portion of my estate as may call for the same in his judgment," and does not relate to or qualify the paragraph next before, namely, the paragraph relied on by him. It is true that the word "request" in the sentence quoted above is in the singular, and that the word "request" appears in the sentence next before, and that that word does not appear in the paragraph before that one. On the other hand the thing dealt with in the paragraph relied on is "disposition" as well as "division," and the testatrix seems to have used the word "disposition" to express a testamentary disposition and not a division during the life of the nephew. It is also to be remarked that the "full confidence" expressed by the testatrix was not that the nephew would "respect" and "carry out" her wishes, but that he would "respect" and "carry them out so far as possible."

In determining whether the paragraph relied on by the plaintiff does or does not create a trust, it must be construed in the light of the attendant circumstances. This will was made in 1899. Eleven years before, the defendant was asked by the testatrix, who lived at Andover, to leave his home in Haverhill, take charge of her property, and make his home with her, under a promise "that if he did so she would at her decease give to him the principal portion of her estate."

Although the intention of the testatrix must be derived from a construction of the words found within the four corners of the will and resort cannot be had to verbal declarations made by her, (*Denfield, petitioner*, 156 Mass. 265,) this agreement is a part of the relations existing between the testatrix and the nephew, which are to be considered in determining the construction of the words used in the will.

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It further appears that the defendant accepted the proposition and moved to Andover, and the testatrix "shortly thereafter" made a will leaving substantially her entire estate to him except a parcel of land in Andover, which was devised to Christ Church. At that time she had several house lots in Haverhill, valued at $14,000, the parcel of land in Andover valued at $6,000, and about $10,000 in personal property.

Four years later, in 1892, the testatrix and the nephew moved to Haverhill and made a home together there until her decease, "during all of which time the defendant George cared for her estate, contributed considerable sums to her household expenses and the improvement of her estate and for several years before her death, during which the testatrix was a confirmed invalid, devoted a great deal of his time, especially during the night, to her personal care." The value of the real estate "had greatly depreciated since 1895, [and] was about $300." In 1899, the testatrix said to the nephew "that her personal expenses, owing to her sickness, had greatly increased so that her personal estate was diminishing rapidly, and she realized that it would diminish still more rapidly if she should live long in her present condition of health; that her real estate had depreciated a great deal."

We are of opinion that this statement is evidence of the facts covered by it under R. L. c. 175, § 66, and the facts are admissible as facts in the light of which the will is to be construed.*

Construed in the light of these circumstances, we are of opinion that the last paragraph is not to be confined to the paragraph next preceding it, and, further, we are of opinion that the paragraph before that, relied on by the plaintiff, does not impose a trust on the property left to the defendant. See *Aldrich* v. *Aldrich*, 172 Mass. 101, where the cases are collected.

Bill dismissed.

* For similar extrinsic evidence admitted to show the intention of a testator that certain legacies in a codicil should be substituted for corresponding legacies in his will and not added to them, see *Gould* v. *Chamberlain*, 184 Mass. 115.

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WILLIAM A. SWEET & others *vs.* CITY OF BOSTON.

Suffolk. March 10, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Constitutional Law, Eminent domain. *Limitations, Statute of. Damages*, For land taken by statutory authority.

Where land is taken by right of eminent domain under a statute which requires a filing in the registry of deeds of a description of the land taken and provides that any person having an estate in any part of the land taken may file a bill in equity for damages within one year from the time of the taking, that the court shall cause notice of the pendency of the bill to be given to all persons having claims under the act in order that they may join in the suit and that any one who does not become a party within the time prescribed by the court shall be forever barred from recovering damages on account of such taking, a notice of the pendency of such a suit given by publication in accordance with an order of the court is sufficient to meet all constitutional requirements.

St. 1867, c. 308, authorizing the city of Boston to take certain land in that city for the purpose of raising its grade in order to abate a nuisance, provided in § 2 that any person entitled to an estate in any part of the land so taken might "at any time within one year from the time when the same shall be taken, as well in his own behalf, as in behalf of all other persons having estates in the land so taken, file a bill in equity" to recover damages, that thereupon the court should cause notice of the pendency of the bill to be given to all persons named as defendants and all persons in whose behalf the bill should be filed and that any person failing to appear and become a party within the time prescribed by the court should be forever barred from recovering any damages on account of such taking. Such a bill being filed, the court prescribed notice thereof by publication in two newspapers in Boston, which was given. Many years later one claiming an estate in part of the land taken, but who had not become a party to the former suit, brought a bill in equity for damages, alleging that he was a minor residing outside of the Commonwealth and that he first had actual notice or knowledge of the former suit or of the taking of the land within a year from the filing of his bill. *Held*, that the suit was barred by the limitation of the statute, and that, the proceeding by which the land was taken being *in rem*, the facts that the plaintiff had no actual notice or knowledge of the taking and that he was a non-resident and a minor were immaterial, the statute making no exception in favor of non-residents or minors.

BILL IN EQUITY, filed May 1, 1886, in the Supreme Judicial Court, to recover compensation for four house lots on the corner of Church Street and Pleasant Street in Boston taken by that city on May 9, 1868, under St. 1867, c. 308, authorizing the taking of the territory described in that act, known as the Church Street district, for the purpose of raising its grade and

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filling it with good materials, to abate a nuisance and for the preservation of the public health.

The answer was filed on April 8, 1887. Issue was joined on October 17, 1903. In December, 1903, the case came on to be heard before *Braley*, J.

The petitioners offered the following amendment to their bill:

"Your petitioners in the above entitled cause respectfully ask this Honorable Court for leave to amend their bill of complaint by adding thereto the following:

"Respectfully represent your orators that the case of *David Cobb* v. *City of Boston* was filed under authority of Chapter 308 of the Acts of 1867 in behalf of all persons interested in the taking of land by the City of Boston but that because of the facts recited in their bill your orators have not joined in said case.

"Wherefore your orators pray that this Honorable Court will reopen the case of *Cobb* v. *Boston* and allow your orators to become parties thereto."

The justice ruled that as matter of law the case of *Cobb* v. *Boston* could not be reopened, and declined to allow the amendment. Upon the evidence he ruled that as a matter of law the plaintiffs were not entitled to maintain their bill, and at the request of the plaintiffs reported the case for determination by the full court.

If the plaintiffs were entitled to maintain their original bill, or if they were entitled to the amendment prayed for and could maintain their bill as amended, the case was to stand for trial upon the question of damages; otherwise, the bill was to be dismissed.

The case of *Cobb* v. *Boston* is reported in 109 Mass. 438, where St. 1867, c. 308, is printed in full in a footnote. The final decree in that case, entered on April 4, 1882, was "Bill dismissed without costs and without prejudice." The bill in equity in that case was brought by David Cobb under St. 1867, c. 308, § 2, in behalf of himself and all others interested in the land taken by the city and was filed within a year from the taking. Many parties joined in the suit, but none of the record owners of the land in question in this suit joined therein. By an order of court notice to all parties interested to join in that

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suit as required by § 2 of the act was published for three successive weeks in two newspapers in Boston. This was the only notice ordered. The plaintiffs were minors residing outside of the Commonwealth and had no actual notice of the suit brought by Cobb and no knowledge of the taking of the land until within one year of the time of filing their present bill in 1886.

J. H. Sherburne, Jr., for the plaintiffs.

S. M. Child, for the defendant.

KNOWLTON, C. J. This is a bill in equity to recover compensation for land taken by the city of Boston on May 9, 1868, under the St. 1867, c. 308.

We need not consider the question whether the plaintiffs were the owners of valuable interests in the property at the time of the taking, for if we assume that they were, and that they have never been divested of these rights except by the taking, we find in their case other insurmountable obstacles to their recovery. The statute authorized the taking of the land for the abatement of a nuisance, and it prescribed for landowners a mode of obtaining compensation for their land. The city was required to file in the registry of deeds, within sixty days after taking any lands, a description of them, and a statement that they were taken pursuant to the provisions of the act. One year from the time of the taking was allowed to every person having an estate in the premises, to file a bill in equity in behalf of himself and all other persons having estates in the land taken, for the recovery of his damages. The court was then required to cause notice to be given of the pendency of the bill to the defendants named in it, and to all persons in whose behalf the bill was filed, and to prescribe how the notice should be given, and the length of time allowed for appearing and becoming a party to the suit. Then follows this provision of the statute: "Any party failing so to appear and become a party within the time prescribed by the court, shall be forever barred from recovering any damages on account of such taking."

In the case of *Dingley* v. *Boston*, 100 Mass. 544, the constitutionality of this statute was affirmed, and it was again affirmed in *Sweet* v. *Rechel*, 159 U. S. 380. A bill in equity was brought for the recovery of damages, in accordance with its provisions, as appears by the report in the case of *Cobb* v. *Boston*, 109 Mass.

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438, where the statute may be found printed in full. Proper notice was given to all persons having estates in the land taken, and all the proceedings seem to have been conducted regularly. The plaintiffs did not appear and become parties, and under the provision of the statute quoted above, they are "barred from recovering any damages on account of such taking."

That the notice given was sufficient to meet constitutional requirements is shown in *Appleton* v. *Newton*, 178 Mass. 276. That the limitation created by the statute in such cases constitutes an effectual bar to recovery after the expiration of the prescribed time, has often been held. *Gately* v. *Old Colony Railroad*, 171 Mass. 494. *McGrath* v. *Watertown*, 181 Mass. 380. *Lancy* v. *Boston*, 185 Mass. 219.

It makes no difference that the petitioners were minors and non-residents, inasmuch as the statute makes no exception in their favor. It is for the Legislature to prescribe proper limitations upon the bringing of actions, and they may make these limitations applicable to non-residents and minors as well as to others. *Taylor* v. *County Commissioners*, 18 Pick. 309. *Hall* v. *Bumstead*, 20 Pick. 2. The taking of land under the right of eminent domain is a proceeding *in rem*, and in statutes authorizing such taking, it is not common to make exceptions as to minors. See *Tyler* v. *Court of Registration*, 175 Mass. 71, and cases above cited. It is important that proceedings in the construction of public works should not be kept open for an unreasonably long time, and it may be assumed that the interest of minors will be protected by their guardians, or by others who are near to them. The cases of *Indiana Central Railway* v. *Oakes*, 20 Ind. 9, and *Coy* v. *Coy*, 15 Minn. 119, relied on by the plaintiffs, are under statutes very different from the one before us.

The plaintiffs have referred us to no authorities which justify us in sustaining their claim, presented to the court for the first time nearly eighteen years after the taking, and not prosecuted to a final hearing until after the expiration of thirty-five years from the time when their cause of action accrued.

Bill dismissed.

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HERBERT L. HILDRETH *vs.* CHARLES THIBODEAU & others.

Suffolk. March 11, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Jurisdiction. Patent. Equity Pleading and Practice, Report of facts under R. L. c. 159, § 23.

On a bill in equity against a resident of another State the court has no jurisdiction to proceed against the defendant *in personam* if the only service upon him has been by the delivery to him in the State in which he resides of a copy of the bill and an order of notice.

A patent right granted by the United States recorded in the name of a citizen of another State has no *situs* in this Commonwealth on which to found jurisdiction of a suit in equity to obtain possession and control of the patent, where no jurisdiction *in personam* has been acquired over the owner of record.

Where a suit in equity comes to this court by appeal from a final decree of the Superior Court, and the judge of the Superior Court makes a report of facts under R. L. c. 159, § 23, to complete the presentation of the questions of law raised, it is not proper for his report to end with a statement of terms of reservation such as would be appropriate in the conclusion of a report under § 29 of the same chapter.

KNOWLTON, C. J. This is a bill in equity brought to obtain the possession and legal control of letters patent of the United States, issued upon an invention of the defendant, Charles Thibodeau, to his wife, the defendant, Catherine M. Thibodeau, and by her assigned before the commencement of this suit to the defendants, Duff and Kitzmiller. From an interlocutory decree dismissing the bill as to the defendants Duff and Kitzmiller, for want of proper service on them, and from a final decree dismissing the bill generally, the plaintiff appealed.

We do not find it necessary to determine whether, upon the pleadings and the report, the plaintiff would be entitled to relief if we had jurisdiction of all the parties, for we are of opinion that we have no jurisdiction to decide important questions involved in the plaintiff's claim. The defendants Duff and Kitzmiller, who appear of record as the owners of the patent, are residents of the State of Pennsylvania. The only service upon them was by the delivery of a copy of the bill and order of notice

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to each of them at Pittsburg, Pennsylvania, where they reside. They appeared specially and objected to the jurisdiction.

It is plain that, as against them, the court acquired no jurisdiction to proceed *in personam*. *Merrill* v. *Beckwith*, 163 Mass. 503. *Eliot* v. *McCormick*, 144 Mass. 10. *Pennoyer* v. *Neff*, 95 U. S. 714. *Freeman* v. *Alderson*, 119 U. S. 185.

It appears by the report that the plaintiff did not desire to have the bill retained for an assessment of damages against the defendants Charles Thibodeau and Catherine M. Thibodeau. The court was, therefore, left without jurisdiction to give him any relief for which he asked, unless it had jurisdiction over the property, such that it could proceed *in rem*, in the absence of the holders of the title to the patent. But letters patent of the United States are not visible, tangible property which has of itself a local character, and of which the court can take jurisdiction apart from the apparent ownership of it. So far as such property has any *situs*, it follows the person of its owner, and ordinarily belongs at his place of residence. From its peculiar character, it is property, in a sense, in all parts of the United States. But this would not justify an assumption of jurisdiction over it by a court of a State in which its owner is not a resident, and where no jurisdiction is acquired over him. The decisions in *Wilson* v. *Martin-Wilson Automatic Fire Alarm Co.* 151 Mass. 515, and *Ager* v. *Murray*, 105 U. S. 126, do not go far enough to aid the plaintiff in this part of his case.

To give jurisdiction over this patent it would be necessary to show that the title of Duff and Kitzmiller is fraudulent as against the plaintiff, or is subject to equities in his favor which give him a right to control the patent. Such proof is a condition precedent to the proper exercise by the court of any jurisdiction over the patent. To a suit to determine a question of this kind the owners of record are necessary parties. Jurisdiction over them, which will authorize a trial of the question, must be obtained before a court can deal directly with the patent as property. We are of opinion that the decrees appealed from were rightly entered.

The concluding sentence of the report is as follows: "I now report this case to the Supreme Judicial Court for its consideration and determination. If, in its opinion, I am right in my

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conclusions of law, the decree is to stand; if, in its opinion, I have erred, such order or decree to be entered as said court may direct." This is irregular. A final decree had been entered and the plaintiff had appealed. Our only jurisdiction of the case is on the appeal. The report is made under the R. L. c. 159, § 23, to complete the record for the presentation of questions of law. Such a conclusion of a report is only proper under the R. L. c. 159, § 29, which permits a judge, instead of finishing a case by the formal entry of a final decree from which an appeal may be taken, to reserve and report it for a final decision by the full court.

Decrees affirmed.

C. Browne, A. P. Browne & J. K. Berry, for the plaintiff, submitted a brief.

W. Quinby, for the defendants Thibodeau.

J. S. Richardson, for the defendants Duff and Kitzmiller.

TRUSTEES OF THE MINISTERIAL FUND IN THE FIRST PARISH IN CAMBRIDGE *vs.* FIRST PARISH IN CAMBRIDGE & another.

Suffolk. March 14, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., HAMMOND, LORING, & BRALEY, JJ.

Devise and Legacy. Condition.

The condition of a bequest of $5,000, "as a nucleus of a fund" for the building of a house of worship if $45,000 additional is secured for that purpose within ten years, is not complied with by securing a fund of $48,000 for the purpose of erecting a meeting house and vestry which might be erected together or separately, no part of the fund having been secured for the purpose of erecting a meeting house alone and nearly all of it having been expended in erecting a vestry alone.

BILL IN EQUITY, filed February 18, 1904, by the Trustees of the Ministerial Fund in the First Parish in Cambridge, a corporation, holding a fund as trustee under the will of Susan E. W. Brackett, late of Cambridge, for instructions.

The case came on to be heard before *Loring*, J., who at the request of the parties reserved it upon the plaintiff's bill, the

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answers of the several defendants and the agreed facts for determination by the full court, such decree to be entered as law and justice might require.

C. Almy, for the First Parish in Cambridge.

S. Hoar, for the American Unitarian Association.

KNOWLTON, C. J. The fifth clause of the will of Susan E. W. Brackett, late of Cambridge, deceased, is in part as follows: "I believe it will be deemed advisable to erect a new house of worship in place of the one now occupied by the First Parish, so, as a nucleus of a fund for the building of such a house of worship, I bequeath to the First Parish in Cambridge, in which my father and brother were deacons for many years, the sum of five thousand dollars, to be held by the trustees of the Ministerial Fund in said parish, until the sum of forty-five thousand dollars additional is secured for that purpose, provided said sum is secured within ten years after the probate of this will, when said trustees are requested to pay over for that purpose said sum and its accumulation. On the failure to raise said money, they are to pay said sum of five thousand dollars to the American Unitarian Association," etc. For a long time the parish had owned and used a meeting house as its regular place of worship, and a vestry or parish house, which was a separate building standing away from the meeting house on the same lot, and connected with it by a plank walk. Before the year 1868, the vestry was moved up to the meeting house and joined to it, the outer walls of neither being removed. Doors for communication were cut between them, and they were afterwards used together as one building. The front part, the meeting house, was used for the regular services on Sundays, and the rear part, called the vestry or parish house, was used for less formal religious purposes, for the Sunday school, for Bible classes, for business meetings of the parish and of the church, for meetings of the various charitable organizations connected with the parish, and for social meetings of the parish and church, and it contained the study of the minister.

There is no doubt that the primary object of the legacy was the erection of a meeting house, or place where the regular religious services of the church on Sundays should be held. The testatrix did not indicate a desire that a vestry should or should

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not be included as a part of the church edifice, but of her intention that the new building should be a meeting house, and take the place of the old meeting house, there can be no doubt.

The parish secured, chiefly by subscription, about $48,000 for "a new meeting house and vestry." Of this it paid back to subscribers who were dissatisfied with the subsequent use of the money about $2,300, and of the remainder it expended all but about $4,000 in the erection of a new vestry and parish house. The old meeting house was repaired at an expense of about $10,000, subscribed specially, and the parish now has on hand only about $4,000 of the money originally raised for the erection of a new meeting house and vestry. The question is whether the parish is entitled to have the legacy of $5,000 paid over to it by the trustees, or whether this money shall go to the American Unitarian Association.

The condition on which the legacy was payable required the raising of an additional fund of $45,000 for the erection of a new house of worship. On the performance of the condition the money secured for this purpose would, in favor of the representatives of the testatrix and others interested in this public charity, be impressed with a trust that it should be held and used for that and for no other purpose. The erection of a vestry or parish house is not the erection of a house of worship, within the meaning of the words of the will. If a house of public worship was erected, containing a vestry within its walls, it would not be contrary to the provisions of the will; but if a fund was raised for the erection of a meeting house and vestry which might be separate structures, with no provision showing what part of the fund was to be used for the meeting house and what part for the vestry, the fund as a whole would not be for the erection of a house of worship. Only an indefinite and uncertain part of the fund, which might prove to be a very small part of it, would be raised for that purpose.

While there is a possibility of a different view, the action of the parish tends to show that the fund of $48,000 was secured for the purpose of erecting a meeting house and vestry which might be erected together or separately. No stated part of this fund was secured for the purpose of erecting a meeting house alone. Nearly all of it was expended in erecting a vestry alone.

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If this money had been secured in accordance with the terms of the will to erect a house of worship, it would have been a misappropriation of it to expend it in the erection of a vestry alone. After it had been secured for this purpose, persons interested in this public charity, acting through the Attorney General as their representative, could have prevented such a misappropriation of it. The effect of such a misappropriation would have been to defeat utterly the purpose of the testatrix to have a fund of $50,000 which should be used for no other object than the erection of a new house of worship.

If the money had been secured exclusively for the erection of a house of worship, with a vestry as a part of the edifice, whether under the will such a misappropriation by the parish before the legacy was received would have been a failure to comply with the condition of the will, equivalent to a failure to secure the money at all, is a question which we need not decide.

There is a strong presumption that, if this money had been raised in such a way that it was to be exclusively appropriated to the erection of a house of worship, with or without a vestry as a part of the same edifice, the parish would not have applied it to a different use, in violation of the rights of those interested in the purpose of the testatrix, and in the charitable use of the money according to the intention of the donors. It is provided by the agreed statement that the court may draw inferences of fact, and we think that the facts particularly stated call for an inference that the money was raised for the erection of a meeting house and vestry which might be built together or separately, and that therefore, of the amount so secured, no particular sum was secured for the erection of a meeting house or house of worship, within the meaning of the provision in the will. The prescribed condition was not performed, and the court are all of opinion that the First Parish is not now entitled to have the money paid over, and unless the fund is raised before the expiration of the ten years, the American Unitarian Association will be entitled to the legacy, and that a decree for instructions should be entered accordingly.

So ordered.

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OTIS COMPANY *vs.* LUDLOW MANUFACTURING COMPANY & another.

Suffolk. March 14, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Mill and Mill Privilege. Watercourse. Constitutional Law.

Under the mill act, Pub. Sts. c. 190, § 2, (R. L. c. 196, § 2,) a riparian owner, who begins a dam but does not finish it until a dam begun later by another riparian proprietor has been completed, if he completes and operates his dam within a reasonable time, has established the priority of appropriation required by the act which gives him a better right than the owner of the dam begun later and finished first, and his protection under the act is the same whether the other dam begun later is above his on the stream or below.

The mill act, now incorporated in R. L. c. 196, is constitutional.

The interference with the use of neighboring property by an appropriation of a mill site under the mill act, now incorporated in R. L. c. 196, is not a taking of property under the right of eminent domain.

The purchase of certain land on a watercourse, which is subject to an agreement running with the land restricting the height to which a dam can be maintained, does not affect the right of the purchaser as the owner of other land two miles farther down on the same stream to construct a dam under the mill act in connection with this other land. Therefore in this case the court did not find it necessary to decide whether the contract in question was attached to the land to which it related or whether it was merely a personal contract of a former owner.

BILL IN EQUITY, filed as amended December 7, 1903, by the Otis Company, a manufacturing corporation, to enjoin the Ludlow Manufacturing Company and the Ludlow Cordage Company from flooding the plaintiff's mill site at Palmer by backing upon it the waters of the Chicopee River by means of a dam constructed and maintained by the Ludlow Manufacturing Company.

In the Superior Court the case was referred to Honorable James R. Dunbar as master. Upon the facts found and agreed he ruled as matter of law that the plaintiff was not entitled to any relief.

The case came on to be heard for final decree, upon the master's report and the objections and exceptions thereto of the plaintiff and the defendants, before *Gaskill*, J., who reserved and

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reported the case and all questions of law therein, including those raised by the objections and exceptions of each of the parties, for determination by this court.

B. B. Jones, (*C. L. Gardner* with him,) for the plaintiff.

W. H. Brooks, (*J. B. Carroll & W. S. Robinson* with him,) for the defendants.

KNOWLTON, C. J. The plaintiff, a riparian proprietor upon the Chicopee River, has lately built across the stream a dam nineteen and twenty-nine one hundredths feet high and three hundred and fifty-three feet long, with a length upon the rollway of two hundred and ten feet. Its expenditure for this development of power was $271,000. The water power is used to generate electricity, which is conducted about three quarters of a mile up the stream to the plaintiff's factory at Three Rivers in Palmer, and there applied to the plaintiff's motors. This factory previously had been run in part by water power taken from the river further up, and in part by steam power.

The first mentioned defendant, the Ludlow Manufacturing Company, which will hereinafter be called the defendant, is also a riparian proprietor upon the river, and at a point two miles below the plaintiff's dam, it has lately built a dam whose height is fifty-one feet, whose length is eight hundred and eighty feet, and the length of whose rollway is three hundred feet. The defendant's expenditure for this development of power was $800,000. This dam was built to enable the defendant to generate electricity to be conducted about four miles down the stream to furnish additional power for use at the defendant's old factories and at a new one in Ludlow. The defendant's dam sets back water upon the plaintiff's dam in such a way as very greatly to diminish the water power there, and this bill is brought to enjoin the defendant from maintaining the dam and setting back the water.

The defendant became the owner in fee, in 1891, of certain land which includes the site of this present dam and the accompanying structures. In 1894, and again in 1898, it employed an engineer to take levels and make surveys, plans and soundings along and upon the property, for the purpose of determining whether or not it was practicable to erect a mill dam upon the site of the dam since completed, and he did the work for which

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he was employed. In January, 1899, the defendant employed one Ball, a civil and hydraulic engineer of experience, and the contract with him recited that the defendant had determined to erect a mill dam on this site, and required him to proceed immediately to make surveys, cross-sectionings, soundings, plans and estimates necessary for the erection of the dam, with raceways, canals and other structures, and to do such other things as might be necessary for the proper development of the water power on this mill site. Immediately thereafter the defendant determined upon the present height and present site of the dam. Ball and the defendant's other agents and employees commenced without delay the work of preparation for building the dam and other structures, and making said development, and they prosecuted it and the work of construction of the dam and other structures continuously and with due diligence to the completion thereof within a reasonable time. The actual work of building the dam was begun on August 3, 1899, with the commencement of the construction of the tail race, and within a reasonable time after making this beginning, the defendant completed the dam with all its appurtenances, and all the transmission lines and mechanism for the utilization of the water power in connection with a new mill which it had built near its other mills at Ludlow, and in connection with the other mills previously constructed, for the working of which this power was to be used. This work was completed and the power was ready to be utilized on October 16, 1901, and the mills were put in operation with the power, but the use of it was suspended by the bringing of this suit.

On the fourth day of April, 1900, the plaintiff determined to build a dam at the site of its present dam, and then began its preparatory work therefor, and prosecuted this work with due diligence until the eleventh day of August, 1900, when it began the work of excavating for the foundations of its dam, and from this latter date it continuously prosecuted the work of construction with due diligence to the completion within a reasonable time of its dam and all appurtenances necessary for the utilization of the power. This work was completed on July 1, 1901.

Each part of the work of building its dam, the preliminary, the preparatory and the permanent work, was begun by the de-

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fendant before the corresponding part of the work of building the plaintiff's dam was begun by the plaintiff. The plaintiff's dam was completed first.

The principal question in the case is, What is the construction of the mill act as applied to these facts? The Pub. Sts. c. 190, § 2 (R. L. c. 196, § 2) is as follows: "No such dam shall be erected to the injury of a mill lawfully existing, either above or below it, on the same stream, nor to the injury of a mill-site on the same stream on which a mill or mill-dam has been lawfully erected and used, unless the right to maintain a mill on such last mentioned site has been lost or defeated by abandonment or otherwise; nor shall a mill-dam be hereafter erected or raised to the injury of any such mill-site which has been occupied as such by the owner thereof, if such owner within a reasonable time after commencing such occupation completes and puts in operation a mill for the working of which the water of such stream is applied," etc.

The plaintiff contends that the defendant has violated that part of the statute which forbids the erection of a dam to the injury of an existing mill site on which a mill dam has been lawfully erected; and the defendant contends that the erection of the plaintiff's dam was a violation of that part of the statute which forbids the erection of a mill dam to the injury of a mill site which has been occupied by the owner thereof, when the owner, within a reasonable time after commencing such occupation, completes and puts in operation a mill, for the working of which the water of such stream is applied.

The statute was enacted for the regulation of the rights of property owners upon streams adapted to use for the supply of power. The framers of it recognized the fact that such property, in many cases, could not be used profitably by an owner for a short distance along the stream, without affecting the property of other owners above and below, and preventing a like use of the stream for mill sites on other land. An enforcement by riparian proprietors of their rights at common law would often make it impossible for any of them to use water power effectively. Therefore, their personal interests, as well as the interests of the public, call for legislation modifying the common law, and regulating the rights of owners of this peculiar

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kind of property. Our mill act is intended to meet this requirement in a way to promote the development of water power from streams for the benefit of individual owners no less than for that of the general public. *Lowell* v. *Boston*, 111 Mass. 454, 464. The framers of the statute foresaw the possibility of a desire of two riparian proprietors owning lands near together on the same stream, each to establish a mill on his own land, when an advantageous use of the water for power would make it impracticable to maintain a mill in more than one of the two places. It was proper to provide for such cases by statute. Accordingly, we have the provision last above quoted. This is, in substance, that as between riparian proprietors so situated, priority of appropriation shall give the better right. The Legislature might have established a different rule. If the time of completion of a mill had been adopted as the time which should determine precedence in the right to use the water, there would have been an inducement to owners to engage in a race to see which could first get the water upon his wheel. In different ways the results of such a rule would have been harmful. The rule prescribed by the statute calls for an actual appropriation of the site to use for the development of water power, followed by a completion of the work and the actual use of the water within a reasonable time. This is substantially the construction which was put upon the St. 1795, c. 74, in the case of *Bigelow* v. *Newell*, 10 Pick. 348, although that statute contained no special provision touching this subject. The Rev. Sts. c. 116, § 2, was in different language from the former act, and contained a prohibition of the erection of a dam to the injury of any mill site on the same stream. Under this statute the case of *Baird* v. *Wells*, 22 Pick. 312, was decided, in which it was held that the Revised Statutes had changed the law, and that the remedy of one who had begun his mill, but had not finished it until after another mill interfering with his had been completed, was by an assessment of damage under the mill act. Thereupon the Legislature passed the St. 1841, c. 18, which is found in almost identical language in that part of the Pub. Sts. c. 190, § 2, on which the present defendant relies. This enactment restored the rule stated in *Bigelow* v. *Newell*, 10 Pick. 348, which was held to have been changed by the Rev. Sts. c. 116, § 2. *Storm* v. *Manchaug Co.*

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13 Allen, 10, 15. That this is the true construction of this statute is further indicated by language used in other cases. *Dean* v. *Colt*, 99 Mass. 486, 487. *Fitch* v. *Stevens*, 4 Met. 426, 428. See also Washb. Easements, (4th ed.) 336, 337. For general discussion of the law, see *Fuller* v. *Chicopee Manuf. Co.* 16 Gray, 43; *Fiske* v. *Framingham Manuf. Co.* 12 Pick. 68; *Fitch* v. *Stevens*, 4 Met. 426; *Cary* v. *Daniels*, 8 Met. 466; *Gould* v. *Boston Duck Co.* 13 Gray, 442; *Smith* v. *Agawam Canal Co.* 2 Allen, 355, 356.

The plaintiff contends that the language of the statute, on which the defendant relies, applies only to owners on the stream below, and forbids their building a dam to the injury of an upper proprietor who has appropriated the power by beginning to build a dam which he completes within a reasonable time, and uses in connection with a mill, and that it does not apply to an owner on the stream above, who completes a dam, and seeks to have it remain with the outflow from the tail race undisturbed by back water from the dam of one who, in like manner, had previously appropriated the power at a point below. We are of opinion that this would be too narrow a construction of the provision. The building of a dam by an upper proprietor, for which he claims the common law right of a riparian owner to have the water flow down the stream without obstruction, would, if the claim were valid, be a great injury to the property of a proprietor below who had previously appropriated the power, but had been unable to complete his dam as soon as the upper dam was completed. In such a case, if the upper dam were protected as lawfully built under the mill act, in reference to a right to have the water flow freely away from it for the creation of power, the injury would be as great as it would be if a dam were built below which set back water upon a previously appropriated mill site above. The result would be that which is sought by the plaintiff in the present case, namely, a requirement that the dam below should be lowered so as not to set back water upon the upper mill. The reason for the enactment of the statute seems to require us to hold it applicable to a proper appropriation of water power in a stream, whether above or below the place where another subsequently begins to build, with the hope of preceding the other in the completion of his work.

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This is in accordance with decisions in other States under similar statutes. *Miller* v. *Troost*, 14 Minn. 365, 369. *Kelly* v. *Natoma Water Co.* 6 Cal. 105. *Kimball* v. *Gearhart*, 12 Cal. 27. *Irwin* v. *Strait*, 18 Nev. 436.

The plaintiff contends that the statute so construed is unconstitutional. We do not deem it necessary to consider at length the constitutionality of this statute. It has often been considered and discussed in previous decisions, and it has uniformly been affirmed. It is urged that the provision for the payment of damages is inadequate. This argument is founded mainly on an assumption that there is a taking of property under the right of eminent domain; but whatever may be the interference with the use of neighboring property by an appropriation of a mill site, it is not a taking under the right of eminent domain. *Murdock* v. *Stickney*, 8 Cush. 113. *Hazen* v. *Essex Co.* 12 Cush. 475. *Lowell* v. *Boston*, 111 Mass. 454, 464. *Turner* v. *Nye*, 154 Mass. 579. *Head* v. *Amoskeag Manuf. Co.* 113 U. S. 9. It is unnecessary to determine, in this case, what constitutional rights one has, in reference to damages for an interference under statutory authority with his right at common law to use the water of a stream without obstruction, where such interference is permitted in the regulation of the rights of different owners, as necessary to an advantageous use of the power; nor is it important now to decide what principles will hereafter be applied in assessing the damages of the present plaintiff, in view of existing conditions. It is enough to say that in our opinion the provision for compensation for damages is adequate to meet such constitutional requirements as are applicable to a statute of this kind. Even in cases arising under statutes which authorize an exercise of the right of eminent domain, it has been held that similar provisions are sufficient to satisfy the language of the constitution. *Boston & Roxbury Mill Co.* v. *Newman*, 12 Pick. 467. *Brickett* v. *Haverhill Aqueduct Co.* 142 Mass. 394.

The plaintiff conteuds that the defendant was precluded from erecting a dam which would interfere with the right to use water power secured to the plaintiff, as between it and one Metcalf, by a parol contract in writing with Metcalf, made on September 26, 1882, but not recorded. This agreement was made in connection with a proposed conveyance from Metcalf to the plaintiff of

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certain land on the river, and a proposed contemporaneous conveyance from the plaintiff to Metcalf of other land. In it each agreed with the other not to construct a dam for the development of his or its power, which should afford more than a prescribed number of feet fall that represented the extent of the power that was allowed to each, namely, nineteen and sixty-five one hundredths feet fall to the plaintiff and twenty-one and thirty-two one hundredths feet fall to Metcalf. Conveyances of land were subsequently made by each to the other in pursuance of this agreement, and Metcalf afterwards conveyed his land to the Ludlow Cordage Company, a corporation which holds it, as the master has found, for the benefit of the defendant as the equitable owner. The master also found that the defendant procured the sale from Metcalf to the Ludlow Cordage Company for its benefit, with full knowledge of this agreement.

We need not determine the effect of this contract in all particulars, for if we should assume in favor of the plaintiff that it was not merely a personal contract with Metcalf, but one which binds subsequent purchasers of his land who take with notice of it, we are of opinion that it is of no effect in the present case. It was an agreement made in reference to the use of the lands then owned by the respective parties, and of those which would come to them subsequently through the proposed conveyances. If a purchaser of either lot, with notice of the agreement, would be bound not to use it in violation of the agreement, it does not follow that such a purchaser would be deprived of his right to use other lands which he might chance to own in any lawful way. The land on which the defendant's dam was erected is nearly two miles further down the stream than the land which Metcalf owned, to which the agreement pertains. The dam was erected under the mill act, by virtue of the defendant's right as a riparian proprietor at the point where the mill site was established. The agreement was either a mere personal contract of Metcalf, or it was a contract connected with his land, which, in equity, would follow the land in the possession of a subsequent owner who took it with notice. If it follows the land, it has no effect upon the rights of the defendant as the owner of other land below. The ruling of the master on this part of the case was right.

Bill dismissed with costs.

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THOMAS M. CARROLL *vs.* BOSTON AND NORTHERN STREET RAILWAY COMPANY.

Suffolk. March 15, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., LATHROP, HAMMOND, LORING, & BRALEY, JJ.

Negligence, On street railway.

If a passenger standing in an electric car, who has started to get out but finds that his stopping place has not been reached, puts his hand against the jamb of the doorway of the car with his thumb in the slot in which the door slides, to support himself against a sudden starting of the car, and the conductor, standing on the platform facing the passenger with his face not more than twelve inches from him and nearly opposite the passenger's hand, slams the door on the passenger's thumb and injures it, there is evidence warranting a finding of due care on the part of the passenger and of negligence on the part of the railway company.

TORT for the crushing of the plaintiff's thumb by a door of a car of the defendant in which the plaintiff was a passenger, through the alleged negligence of the conductor of the car. Writ in the Municipal Court of the City of Boston dated January 7, 1902.

On appeal to the Superior Court the case was tried before *Aiken*, J. At the close of the evidence the defendant requested the judge to direct a verdict for the defendant on the grounds that, as matter of law, the plaintiff's keeping his hand in the door jamb until it was crushed was not due care and legally contributed to causing the plaintiff's injury, and that there was no evidence to warrant a finding that the conductor knew, or ought to have known, that the plaintiff's thumb was in a place of danger and that therefore there was no sufficient evidence of the defendant's negligence.

The judge refused to rule as requested. The jury returned a verdict for the plaintiff in the sum of $300; and the defendant alleged exceptions.

H. F. Hurlburt, B. B. Jones & F. P. Cabot, for the defendant.

J. A. McGeough, for the plaintiff.

LORING, J. The evidence warranted the jury in finding these facts. The plaintiff was a passenger on a surface car of the de-

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fendant railway, on a cold day in December. The glass of the windows was so coated with frost that a person on the inside could not see out through them. The plaintiff wished to stop at the street next beyond Joiner Street, and supposing that the car had passed Joiner Street he gave a signal to the conductor to stop at the next street. As the car came to a standstill he got up from his seat and walked back toward the door, which the conductor had opened. He then saw that the car had stopped at Joiner Street, and said to the conductor that he had made a mistake; that he did not want to get off there, but at the next stopping place, and he put out his hand against the jamb of the doorway, about half way up, with his thumb in the "slot in which the door slides," to support himself against a sudden starting up of the car as it had "stopped unusually sudden." Thereupon the conductor, who was standing on the platform on the same level as the floor of the car, and who saw the plaintiff's thumb in the slot of the door, or, if he had exercised due care would have seen it there, "got into a fit of rage," slammed the door on to the plaintiff's thumb with an oath, and caused the injury here complained of.

The defendant's contention is that there was no need for the plaintiff's putting his thumb in the slot. But it is plain that a passenger, in the exercise of due care, can grasp something to steady himself against being thrown back and forth by the car's starting forward suddenly. The jury were warranted in finding that this passenger had reason to suppose that this car might start forward suddenly, and that there was not anything else which gave this plaintiff a means of so steadying himself except grasping the slot.

The jury were warranted in finding that the conductor knew, or, if he had exercised due care would have known, that the plaintiff's thumb was in the slot. There was evidence that he was standing facing the plaintiff, not more than twelve inches away from him, and that the plaintiff's hand was about opposite his face.

The custom which exists in England of having the doors of railway carriages on steam railroads shut by the guard from the outside just before the train starts, makes the English cases relied on by the defendant of no value here.

Exceptions overruled.

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PATRICK BEATTY *vs.* HENRY WEED & another.
JOHN LYDON *vs.* SAME.

Middlesex. April 1, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., LATHROP, HAMMOND, LORING, & BRALEY, JJ

Negligence, Employer's liability.

If a superintendent directing the demolition of a boiler house goes to dinner, leaving the men whom he has employed for the work engaged upon it according to a safe method prescribed by him, and in his absence three of the men devise a speedier way of demolishing the building by means of a heavy iron pipe used as a battering ram and applying this method knock out a brick pier supporting one corner of the building, causing the whole building to fall suddenly and to injure two of the workmen who had nothing to do with the adoption or use of the battering ram, there is no evidence to support an action by the injured workmen against the superintendent for negligence.

TWO ACTIONS OF TORT against Henry Weed and the Winchester Manufacturing Company, also originally against two other defendants as to whom the plaintiffs discontinued their actions, for personal injuries sustained while in the employ of the defendant Weed. Writs dated March 13, 1903.

In the Superior Court the cases were tried together before *DeCourcy*, J. At the close of the evidence the judge ruled that the plaintiffs could not recover against the Winchester Manufacturing Company and directed a verdict for that defendant. He refused to rule that the plaintiffs could not recover against the defendant Weed, who was one of the incorporators of the Winchester Manufacturing Company, a corporation manufacturing gelatine, and was its superintendent. The defendant Weed employed the plaintiffs and four other men for the work described in the opinion.* The jury returned a verdict for the plaintiff Beatty in the sum of $2,000 and for the plaintiff Lydon in the sum of $1,000. The defendant Weed alleged exceptions.

D. T. Montague & W. Keyes, for the defendant Weed.

F. P. Curran & J. P. Feeney, for the plaintiffs.

HAMMOND, J. The question is whether the evidence warranted the verdict against Weed.

* The defendant Weed was sued as owner of the building demolished. The land on which it stood was conveyed to the manufacturing company about three weeks after the accident.

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It appears that he was engaged in superintending the demolition of a boiler house. This was a brick building running east and west, twenty-eight feet long, twenty-two feet wide, with brick sides and end walls, and an arched brick roof supported by a brick wall running lengthwise through the building from the ground up to the arch. The thickness of the outside walls was twelve inches and of the centre wall eight inches. The arch roof was eight inches thick, being composed of two layers of brick, set edgewise in cement. Iron stay rods, two or three feet apart, ran crosswise of the building, through the side and centre walls, their ends projecting through the side walls and through a strip of iron upon the outside of the building, to which iron the rods were firmly held by nuts. The southeast corner of the building was supported by a brick pier, there being two doors next to the pier, one on the south side and one on the east side of the building.

On the morning of the accident the plaintiffs with several other men were set to work by Weed to demolish the building. The plaintiffs first knocked out a portion of the west end and then, by Weed's orders, went upon the northerly half of the adjoining part of the roof and began to break that in by hammers, working easterly. While doing this they stood upon the roof, and the bricks, as they were knocked off, fell inside the building. They continued this work several hours until twelve o'clock, when they stopped one half hour for dinner. Upon the easterly end of the building similar work was being done by some of the other men. Only a few feet of the roof, however, had been removed at either end when all the workmen stopped for dinner.

While the men were engaged in this work the defendant Weed, as was his custom, left the premises a few minutes before twelve to go to dinner, and returned in an hour. While he was gone the accident occurred. The plaintiffs' evidence tended to show that at half past twelve the men all resumed work at their respective places. Shortly after resuming, three of the men at work at the easterly end came to the conclusion that there was a more expeditious method of demolishing the structure than that adopted by Weed. Whereupon they looked around and finally found "somewhere on the grounds" a heavy iron pipe about fifteen feet long, and using this as a battering ram against

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tho pier at the southeast corner of the building speedily demonstrated the accuracy of their theory. The pier being knocked away, down came the whole building in a heap, and the plaintiffs were hurt.

We think that there was no evidence of negligence on the part of Weed. It is plain that the accident was not due to any fault in the plan of demolition adopted by Weed, but to the action of the fellow servants of the plaintiffs in departing from that plan. He had the right to assume that during the short time in which the work would go on in his absence the general directions which he had given would be followed; and we do not think that his failure to anticipate so ambitious and unusual an attempt on the part of his workmen to facilitate the work and shorten the job can be regarded as negligence. Whatever negligence there was, was that of the fellow servants of the plaintiffs.

Exceptions sustained.

COMMONWEALTH *vs.* MARIEA ADAMS.

Suffolk. April 1, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., LATHROP, HAMMOND, LORING, & BRALEY, JJ.

Husband and Wife. Evidence, Presumptions and burden of proof. *Practice, Criminal*, Exceptions.

The presumption that a crime committed by the act of a married woman in the presence of her husband is the crime of the husband and not of the wife is not conclusive, and evidence of the woman's conduct even in her husband's presence may be sufficient alone to rebut it.

No exception lies to a refusal to give a ruling although correct if the subject of the ruling was covered sufficiently by the instructions given, or if an instruction was given more favorable to the excepting party than that refused.

A defendant in a criminal trial has no more right than a party to a civil action to pick out a portion of the evidence and ask for a ruling upon it, and the refusal of a request for such a ruling is no ground for exception.

INDICTMENT FOR LARCENY in three counts found and returned on January 4, 1904, the first count charging the larceny of a finger ring, the property of Alanson Bigelow, the second count charging the larceny of a glass dish, the property of Jordan,

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Marsh and Company, and the third count charging the larceny of several pieces of jewelry, the property of some person unknown.

In the Superior Court the defendant was tried before *Bond*, J. By agreement of parties, the judge directed a verdict of not guilty on the third count, and the jury returned a verdict of not guilty on the second count.

Upon the first count the defendant among other requests asked for the following rulings:

"2. That if the jury find as to count one, that the property was stolen by the defendant, while in the presence of her husband, she is to be acquitted, for the reason that she is presumed by law to have acted under his coercion or control.

"3. There is no evidence to rebut the presumption of coercion as to count one.

"4. The evidence relied on by the Commonwealth to rebut the presumption of coercion must be proven beyond a reasonable doubt.

"5. The facts relied upon by the defendant to prove that the man with her was her husband, and to raise the presumption of coercion, need not be proved by her beyond a reasonable doubt, but may be proved by a fair preponderance of the evidence introduced either by herself or by the government.

"6. A woman is presumed to be under the coercion or control of her husband, and not guilty of the offence of larceny, if she, while in his presence, steals, or if he, while in her presence, steals, although she knows he is about to steal, remains silent while he steals, and does not disclose the larceny at the time of its committal or subsequently.

"7. There is no evidence that the defendant while in the Bigelow store said anything or did anything which can be found by the jury to be sufficient to rebut the presumption of coercion.

"8. If the jury find, beyond a reasonable doubt, that the defendant, after being taken by the clerk of Bigelow's store from the sidewalk, made any false statements as to who the man was who was with her, or any false statements as to the alleged stolen property, such false statements would not rebut the presumption of coercion if made by her solely for the purpose of shielding herself or her husband from the legal consequences of his guilty conduct."

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"10. The defendant is presumed to be innocent.

"11. If the Commonwealth relies on circumstantial evidence to overcome the presumption of innocence, or the presumption of coercion, it must prove such a state of circumstances as will admit of no reasonable construction except that of guilt. If the circumstances can reasonably be construed in favor of her innocence, that construction must be adopted by the jury."

"21. If the jury find that the man with the defendant at Bigelow's store was her husband, the defendant must be acquitted."

The jury returned a verdict of guilty on the first count; and the defendant alleged exceptions.

J. B. Moran, for the defendant.

J. D. McLaughlin, Second Assistant District Attorney, for the Commonwealth.

LORING, J. The defendant was convicted on the first count of the indictment against her. In that count she was charged with the larceny of a ring. It appeared in evidence that on the 22d of December, shortly before five o'clock in the afternoon, when the store was crowded with shoppers for Christmas, a man and a woman (the woman being the prisoner whose exceptions are now before us) came into a jewelry store, walked to a showcase about forty feet from the door, and asked to see some signet rings. They had some discussion with the clerk as to which of the signet rings shown would "take" the initial she wished cut on it, and as to whether the cutting could be done by Christmas, and it was arranged that the initial should be brought in the next day. The man and woman were then invited by the clerk to go to the art room and see if there was anything there which they might like to buy. The clerk then busied himself in arranging a tray of rings for the next day's trade. He had two trays, each filled in part with rings for sale and in part with dummy rings put in when a ring was taken out on being sold. He had taken all the dummy rings out of one tray and filled it with diamond and ruby rings, when the man and woman appeared again; this was some twenty minutes after they left to go to the art room. The woman said she was interested in looking at pretty things, and asked if it would bother the clerk if she was allowed to look and ask questions. He answered that it

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could do no harm if she looked in the case. Thereupon she reached forward and lifted one of the trays of rings toward her, whereupon the clerk took hold of the tray. The tray which was the one full of diamond and ruby rings lay on the show-case next the man and woman, with a tray containing some dummy rings behind it, and the clerk leaning over with his hands on the two trays. At this time a customer known to the clerk came to the show-case and asked when he would be at liberty. The clerk turning toward him said: "If you will wait a moment, I think I can be ready to wait on you." To which the customer answered that he was too busy then and would come in in the morning, and asked at what time he should come. The clerk said, "Half past eight promptly." The clerk testified that at that very instant he realized that the man and woman were going away very rapidly toward the door; he looked down, saw that the ring in the corner of the tray was gone, shoved the trays into the show-case and ran after them. The nearer they got to the door the faster they went. The clerk caught up just as the man, who was ahead, reached the door and "jumped out into the street, and disappeared in the crowd." The clerk took hold of the woman, who was then on the sidewalk. She cried, "Let me go!" He said "There is a ring missing, and we shall be obliged to detain you." She ceased struggling and went back; said she knew nothing about the ring. The clerk said: "Then the gentleman who was with you must," to which she replied that she knew nothing about the man; that she met him on the street; that he spoke to her and she to him, and "we went immediately to your store." She said that she lived at Los Angeles; that she was "travelling around"; that she had a little money in the Los Angeles bank, enough property to take care of her; that she had no baggage except a grip, which was at the Lenox where she stopped the night before; and, in answer to a question, that she had no change of clothing coming on from Los Angeles and travelling about. She was then taken into custody. At the station house she repeated the same story, adding that she had a cousin somewhere in the city and was going "to look them up," but had not done so. She had a hand bag with her in which was a dish.

The officer who took her into custody testified that she said

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she was not married, that she was a widow. Another officer testified in addition that she said she did not know the name of the man who had escaped; that she met him about half an hour before they went to the store; that after they met they went to a restaurant and had two or three drinks, and from there they went to the store; that she said she did not know "at whose solicitation they went into this store." This officer also testified that on his telling her that he was going over to the Lenox, the defendant said "'You need not go to the Lenox; I do not want to send you on a fool's errand, as I only arrived here this morning,' or something to that effect." On some pictures being brought out by the chief inspector of police, she admitted that one of them was a picture of herself, and added, on being asked who she was: "Now you wait till the morning when I am brought over to the office; they will all know who I am; that will be time enough."

The prisoner did not testify but offered evidence that the man who was with her was her husband; that their home was in Detroit, and "that they left together a few weeks before the alleged larceny to go East." No other evidence was offered by her.

Ten out of twenty-one rulings requested by the prisoner were refused. She took exceptions to the failure to give these rulings, and "also to such instructions as the court did give inconsistent with any instructions asked for, and also as to that portion of the court's charge relating to the presumption of coercion and the rebuttal thereof."

The jury found the defendant guilty on this first count, and the case is here on these exceptions.

It is not necessary to go at length into the rule which raises a presumption that the wife is the innocent and the husband the guilty one when a crime is committed by a wife in her husband's presence. The rule and the reason for it are well stated in *Commonwealth* v. *Wood*, 97 Mass. 225. It also is settled in this Commonwealth that "when a married woman is indicted for a crime, and it is contended in defence that she ought to be acquitted because she acted under the coercion of her husband, the question of fact to be determined is whether she really and in truth acted under such coercion, or whether she acted of her own free will

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and independently of any coercion or control by him. To aid in determining this question of fact, the law holds that there is a presumption of such coercion from his presence at the time of the commission of the crime; this presumption, however, is not conclusive, and it may be rebutted." *Commonwealth* v. *Daley*, 148 Mass. 11, 12. See also *Commonwealth* v. *Moore*, 162 Mass. 441. It follows that the judge was right in not giving the second, sixth and twenty-first rulings asked for.

On the evidence the jury may well have found that the larceny was the result of a preconcerted scheme to steal, in pursuance of which the prisoner had travelled from Detroit to Boston, to take advantage of the opportunities for theft in a jewelry store when crowded by shoppers just before Christmas; that the sole object in visiting this store and all that was done in it were in pursuance of this scheme; and from the falsity of the story told by her and the failure to give any honest account of herself when she tried to, the jury were warranted in believing that the scheme was a deliberate one. If the jury believed this they had a right to believe that she was a guilty party, jointly liable with the husband for the larceny, and not an innocent wife acting under her husband's coercion. The third request was rightly refused.

There was no occasion to instruct the jury as to whether what passed in the jewelry store was sufficient by itself to rebut the presumption of innocence from coercion. That was not the question. The question was whether what happened there, considered with the other evidence in the case, was sufficient to rebut and did in fact rebut this presumption.

The defendant has argued that the whole conduct of the woman in the store must be thrown out in considering whether the presumption is overcome because during all this time she was in the presence of her husband. It is true that the presumption applies to all her conduct, but as the presumption is not a conclusive one, her conduct, even in her husband's presence, may be such as alone and by itself to overcome the presumption. See in this connection *Commonwealth* v. *Moore*, 162 Mass. 441.

The jury were told: "Now, this case is like all others that you have had in this respect; the government is bound to prove beyond any reasonable doubt all the elements that are necessary to be proved in order to make out the guilt of the defendant upon

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each of these counts — all that that involves. The larceny of the property and the liability of the defendant, if she is a married woman and if with her husband at the time of the larceny, if there was any, under the first count the government has to prove that beyond a reasonable doubt. It is for you to say whether the evidence satisfies you beyond a reasonable doubt of the guilt of the defendant under the rules of law as I have stated them to you," and the fact that the government had to prove its case and the whole of it beyond a reasonable doubt was repeated several times. This was correct. No exception was taken to the charge except on the part relating to coercion and except so far as it was inconsistent with the rulings asked for. Although possibly the law might have been stated as it is stated in the fourth, tenth and eleventh rulings asked for, this instruction was sufficient, and the exceptions to the failure to give these rulings must be overruled.

No instruction was given to the jury as to what proof of her marriage had to be made on the part of the prisoner to raise the presumption. It was correct to instruct the jury that the burden was on the government to prove beyond a reasonable doubt "the liability of the defendant, if she is a married woman and if with her husband at the time of the larceny, if there was any." The instruction given was more favorable to the prisoner than the fifth ruling asked for by her.

The defendant has no right to pick out a part of the evidence and ask a ruling upon it. *Commonwealth* v. *Gavin*, 148 Mass. 449. *Lufkin* v. *Lufkin*, 182 Mass. 476. The law upon the matter covered by the eighth ruling was correctly stated, and the exception to the failure to give it must be overruled.

Exceptions overruled.

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CHAUNCEY E. PECK, administrator, *vs.* COLUMBUS S. SCOFIELD.

Hampden. April 1, 1904. — May 20, 1904.

Present: KNOWLTON, C. J., LATHROP, HAMMOND, LORING, & BRALEY, JJ.

Trust, Creation. *Gift*, *Causa mortis*. *Savings Bank*.

A married woman living apart from her husband made savings bank deposits in her name as trustee for her adopted son, and also in the joint names of herself and her adopted son subject to withdrawal by either or the survivor. The adopted son never knew of the deposits until after her death. After retaining the savings bank books for about three years and making deposits in the accounts from time to time, the depositor in contemplation of a surgical operation placed the books in the hands of a woman friend, with other similar books in a sealed package, accompanied by a request in writing that the books for her son should remain "in trust" for his benefit and the fund be used, in the discretion of the trustee, for his clothing, education and expenses, and that if any balance remained it was to be paid to the son absolutely upon his marriage or, if his father died before him, such payment in the discretion of the trustee could be made before the son came of age. The depositor did not die from the operation but lived more than two years, during which time, although once she made an examination of them, she left the books in the control and possession of the trustee, who continued to hold them until after the death of the depositor. *Held*, that these facts warranted a finding that an express trust was created, and that the delivery of the bank books was not intended as a *donatio causa mortis*.

APPEAL by the surviving husband of Nellie M. Scofield, deceased intestate, from a decree of the Probate Court for the county of Hampden allowing in the account of the administrator of her estate an item, in the schedule showing payments, charges and distributions, of "Savings Bank deposits claimed by Charles M. Scofield, $2,207.13."

The appeal was heard by *Lathrop*, J., who found "on the agreed facts and the evidence, that Mrs. Scofield delivered the bank books in question during her lifetime to Mrs. Bronson, in trust for the benefit of her adopted son, Charles M., and that the delivery was not intended as a *donatio causa mortis*; and that said books formed no part of the estate of Mrs. Scofield at the time of her death."

The justice made a decree affirming the decree of the Probate

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Court, and remitting the case to the Probate Court for further proceedings. The respondent appealed.

J. Barnes, for the respondent Columbus S. Scofield.

C. H. Barrows, guardian *ad litem*, for Charles M. Scofield.

BRALEY, J. This is an appeal from the decree of a single justice of this court affirming a decree of the Probate Court allowing the account of the appellee as administrator of the estate of Nellie M. Scofield. The only question presented by her husband, the appellant, is whether an item of $2,207.13, being the amount of certain deposits in savings banks made by the intestate, is to be deemed an asset of her estate, or held to be a trust fund created by her for the benefit of an adopted son, Charles M. Scofield. The material facts do not appear to be in dispute, and they show that the deposits which make up this amount are five in number; two of them were made in the name of Nellie M. Scofield in trust for Charles M. Scofield, while two are described as deposited by Nellie M. Scofield and Charles M. Scofield subject to the withdrawal of either or the survivor, and the fifth account is in the name of "Nellie M. Scofield or Charles Mears Scofield."

At the time of making each deposit none of the money deposited belonged to the adopted son, but it was advanced by the intestate, and the books were never delivered to him, neither, up to the time of her death, had he been informed of the fact that such deposits had been made, while she continued to retain possession of the books and remained in control of the fund until the time when in contemplation of a surgical operation she placed the bank books in the hands of a friend. At the time of their delivery they were placed with other similar books in a sealed package, and accompanying the books, and forming a part of its contents were two requests in writing signed by her, in which she gave directions as to the disposition that should be made of all the books in the event of her death. That portion of these writings which relates to the controversy in this case states in substance that the books for her son are to remain in trust for his benefit, and the fund is to be used, in the discretion of the trustee, for his clothing, education and expenses, and if any balance remains after carrying out this provision it is to be paid to him absolutely upon his marriage, or if his father dies

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before him, then in the discretion of the trustee such payment could be made before he became of age.

It is the contention of the appellant that by this transaction her sole purpose was to make a gift *causa mortis*, and that unless it can be so considered then these deposits must be held to be a part of her estate.

If we put to one side the obvious answer that whether in any case the intention to make such a gift has been established is a question of fact which must depend on the evidence, and that the finding is adverse to this claim, an examination of the testimony does not furnish a sufficient foundation to support the argument advanced.

If it can be said that at any time before the operation was performed it was of such a character as reasonably to cause apprehension on her part that she could not survive, it also appears that the first letter of which the second is only an amplification, though both may be treated as forming a declaration of trust, was written nearly five months before the package was delivered by her to the trustee, or she went to the hospital for treatment, and during a period when resort to such an operation was not immediately contemplated.

While the form of the deposits is immaterial if no delivery is shown, yet it becomes important upon delivery being proved when the question is raised whether the entire transaction is to be regarded as a trust, or only a gift in present contemplation of death.

At least the first two of the deposits had been made three years before the date of the letter and in the form to which reference has already been made, and these were followed by other deposits of a similar character, and all of whatever date are spoken of by her in each letter as a trust fund.

It may be conceded as argued by the appellant that when a gift is made in expectation of death there is always present the implied condition that it is revocable by the recovery of the donor, which event happened in this case. *Parish* v. *Stone*, 14 Pick. 198, 204.

But it does not follow that because such a gift cannot be found on the facts disclosed, the money belongs to her estate if a reasonable interpretation of her acts leads to the conclusion

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that in some form it was her intention to provide for the support and education of her son, and she took the necessary steps from which such a purpose not only can be ascertained, but may be legally carried into effect.

A trust in personal property does not require a written declaration to support it, though when put in this form its terms are more readily and satisfactorily determined, but it may be supported by oral evidence; and when it appears that a trust of this nature has been created it becomes effectual to transfer the title and operates as a gift perfected by delivery of the property which constitutes the body of the trust. But there must be always some qualifying act by which the donor's ownership of the fund is divested, followed by an acceptance by the person selected to act as trustee, of the duties raised by the fiduciary relation. *Urann* v. *Coates*, 109 Mass. 581, 584. *Gerrish* v. *New Bedford Institution for Savings*, 128 Mass. 159. *Chace* v. *Chapin*, 130 Mass. 128.

In the case at bar there was a sufficient formal declaration of the object to be accomplished independently of the statements appearing in the form in which the several deposits were made. In plain and unambiguous words the settlor declared her purpose in each paper to be that all the deposits standing in the name of her son, or of herself, but really intended for his use and benefit, were in trust "to be used for his clothing, education and expenses as in your judgment you see he needs." Domestic differences had apparently arisen, and at this time she was not living with her husband, from whom she remained separated until her death, and her desire seems to have been not only to make pecuniary provision for her son, but at the same time to provide him with some measure of friendly interest and advice on the part of the trustee to whom she speaks in words of personal entreaty that fully disclose her thought. "Charlie needs as he grows older . . . a loving friend to be interested in what such a boy needs. Don't lose sight of him, let him feel he has a precious friend in you, for his mother's sake."

When Mrs. Bronson, to whom this declaration was formally addressed, received it, together with the bank books, there was a symbolical delivery to her of the fund which was held on deposit by the several banks which had issued them.

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The conduct subsequently of Mrs. Scofield is confirmatory of her original purpose, for after all this had been done a period of more than two years elapsed before her death, during which time no change was made in the form of the transaction, though once at least she made an examination of the books, but still left them in the possession and control of the trustee, and nothing appears to show any change of her primary intention, and even less any desire on her part to revoke the trust.

If we take into consideration the relation of the parties, the object of the gift shown by the written declaration, and the conduct of the trustee, who understood that a trust had been declared which she was to execute, though after the death of Mrs. Scofield she thought under the circumstances it was better for her not to have anything to do with it, and delivered the books to the administrator, enough appears to show that a complete declaration of trust was made by the owner of the fund, followed by a delivery to the person who was to act as trustee, not only of the writing, but of the property itself, and that this trust was accepted. It therefore could be found properly that the property was held by Mrs. Bronson upon an express trust, the terms of which were fixed and definite, and that there had been a perfected gift for that purpose of the fund now on deposit. *Cleveland* v. *Hampden Savings Bank*, 182 Mass. 110, 112.

If so, then the title to these deposits had passed to the trustee, and at the death of the founder of the trust they formed no part of the assets of her estate. *Chace* v. *Chapin, ubi supra.*

Decree affirmed.

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CORA E. JONES *vs.* NEWTON STREET RAILWAY COMPANY.

Middlesex. March 4, 1904. — May 21, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Practice, Civil, Exceptions. *Rules of Court.*

If after a charge to a jury a request for a ruling is made and refused, and the judge gives further instructions upon the question of law raised by the request, if the party presenting the request remains silent, and does not claim an exception until his bill of exceptions is presented for acceptance, under Rule 48 of the Superior Court he has lost the right to except to the refusal of the ruling, and it does not matter that he meant to save an exception and supposed in spite of his silence that he had done so.

TORT for personal injuries incurred while alighting from a car of the defendant. Writ dated December 24, 1900.

At the trial in the Superior Court before *Sherman*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions. The judge, after stating that he was disposed to allow the exceptions if he properly could do so under the circumstances which appear in the opinion, certified upon the exceptions "Allowed, if the court had the right to do so on statement in the bill of exceptions."

F. W. Dana, (*W. C. Henderson* with him,) for the plaintiff.

W. M. Lindsay, for the defendant, was not called upon.

BRALEY, J. The first question is whether any exception is properly before us.

It appears that after the instructions to the jury had been completed the ruling requested and refused was presented for the first time to the presiding judge.

Under Rule 48 of the Superior Court it is provided that "No exception shall be allowed by the presiding justice, unless the same be alleged and saved at the time when the opinion, ruling, direction, or judgment excepted to is given. . . . All requests for instructions shall be made in writing before the closing arguments unless special leave is given to present further requests later."

The purpose of this rule is to ensure the orderly conduct of trials so that not only the court but the parties may definitely

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know what questions of law it is proposed to raise by requests for rulings, and it is of much practical importance that before the charge to the jury the different views of counsel shown by such requests shall be formally presented for consideration.

While the flexibility of the rule permits them to be received in the discretion of the court at any stage of the trial before the jury retire to consider their verdict, no corresponding privilege is given by the clause which requires such an exception to be alleged and saved at the time the adverse ruling is given. *Boutelle* v. *Dean*, 148 Mass. 89.

If in the trial it can be said to be a question of intention on the part of counsel whether or not this statutory right shall be exercised when occasion demands, yet, in some definite manner that can be clearly understood, the excepting party must make known his desire to take advantage of it when such a ruling is given.

It often happens that rulings are asked, with an implied understanding on the part of counsel and the court that, if refused, no formal action is required to save and complete this right, but no particular form of expression by which an exception is to be properly saved is prescribed or recognized in practice; and it is generally sufficient that, at the time, such purpose is plainly manifested, in whatever way; yet the exception does not become perfect unless the presiding justice also understands that it has been taken. *Leyland* v. *Pingree*, 134 Mass. 367, 370.

When the ruling that "in the absence of evidence to the contrary, the servants of the company, in charge of the car, are presumed to have started it" was presented, with a request that it be given, it was refused by the judge, and the refusal was followed by instructions to the jury upon the principle of law which had been raised, and it then became the duty of counsel for the plaintiff, if he wished an exception, to make his intention known by a distinct declaration that he excepted to the denial of his request.

No such action, however, was taken. He chose to remain silent, and nothing further was done by him until the bill of exceptions was presented for formal allowance, when he made a claim that he meant to save an exception if the ruling requested was not given; and he now contends that notwithstanding his

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silence he supposed that enough had been done on his part to accomplish this object. But the statement of the presiding judge which appears in the exceptions makes it clear that while at the time the request was presented he supposed counsel intended to save an exception, yet, as nothing was said to the court after it was refused, he inferred that such an intent had been abandoned. Under these conditions it must be held that he also had a right to assume that the instructions given by him in place of the request covered the point raised and were satisfactory to the plaintiff.

This view is further confirmed by the certificate of allowance, which was made subject to the express qualification that no exception was allowed unless upon the history of the trial to which reference already has been sufficiently made, it had been duly saved.

If the most liberal interpretation of the rule is adopted in favor of the plaintiff's contention, it is evident that she has not brought herself within its provisions, and no exception is found which her counsel can be permitted to argue. *Thwing* v. *Clifford*, 186 Mass. 482.

Exceptions dismissed.

IRENE A. HYDE *vs.* CITY OF BOSTON.
SAME *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 13, 1903. — May 31, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Way, Defect in highway. *Negligence*, Contributory. *Street Railway. Boston Elevated Railway Company.*

If the sidewalk and street in front of a building in process of construction are obstructed as far as the tracks of a street railway but the tracks and the other side of the street are open for travel, and if between the rails of the track next to the obstruction there is an unguarded deep trench filled with soft mud as high as the level of the street and looking like the rest of the street when wet and muddy, a woman, who seeking to pass along the street is forced to go around the obstruction and thinking that she is taking the best and nearest way, after looking down and ahead to see where she best can walk, seeing no barrier and hearing no warning, steps into the mudhole and is injured, can be found to be in the exercise of due care both in relation to the city maintain-

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ing the highway and to a railway company maintaining the tracks which by statute is bound to keep the surface of the portions of the street occupied by its tracks in repair.

So far as a street is suffered to remain open for travel the duty of the city maintaining it, to take proper precautions to make it safe for travellers, extends to the portions of the street occupied by the tracks of a street railway company which is bound by statute to keep the surface of the portions of the street occupied by its tracks in repair.

A deep trench crossing the tracks of a street railway company, dug for the purpose of laying a drain under a permit from the city maintaining the highway, which has been in existence for four or five days and is left unguarded in a portion of the street open to travel, filled with soft mud and looking on the surface like the rest of the street when wet and muddy, can be found to be a defect in the highway.

The provision of Pub. Sts. c. 113, § 32, requiring street railway companies to keep in repair the surface of the portions of the streets occupied by their tracks, which has been repealed as to street railway companies generally, remains in force as to the Boston Elevated Railway Company until June 10, 1922, when St. 1898, c. 578, § 26, repealing the provision is to apply to that corporation. See § 28.

Whether a street railway company, which by statute is bound to keep the surface of the portions of streets occupied by its tracks in repair, is liable for an injury to a traveller, who in the exercise of due care falls between its tracks into a deep trench filled or partly filled with soft mud, depends on the questions of fact whether the trench had been filled to a point where the company became responsible, whether, if it had, the company had been negligent in attending to the duty of repair, and whether such negligence contributed to the injury.

MORTON, J. These are two actions of tort, one against the city and the other against the Boston Elevated Railway Company, for personal injuries sustained by the plaintiff in December, 1899, while travelling on that portion of a highway called Roxbury Street in Boston occupied by the railway company's tracks. The actions were tried and have been argued together. At the close of the evidence the judge of the Superior Court ruled that the plaintiff could not recover in either action, and directed verdicts for the defendants. The cases are here on exceptions by the plaintiff in each case to this ruling.

It appeared that a deep trench had been excavated in the street for the purpose of laying a drain from a building in the process of erection to the main sewer. The trench extended under the railway track, and it was admitted that the drain was being laid under a permit from the city to one Shaughnessy. The evidence tended to show that the trench had been there four or five days. At the time of the accident the sidewalk and the street in front of the building were obstructed so that it was impossible to pass along the sidewalk, or the street between the

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sidewalk and the first railway track. The plaintiff had occasion to go from a point on Gardner Avenue which came into Roxbury Street on the same side as that on which stood the building that was in process of erection to a point on Gardner Street beyond the building and also on the same side. To get round the obstructions she went out into the street and along the railway track. While walking along the track she sank into the trench, which was full or nearly full of soft mud, and received the injuries complained of. There was testimony tending to show that cars were passing through the street and teams also and travellers on the side opposite from the building. The testimony was contradictory as to the nature and extent of the barriers and notices and what and where they were, and also whether any warning was given to the plaintiff and whether there were any men at work in the trench when the accident occurred. There was also contradictory evidence as to the appearance and condition of the trench; — the plaintiff and some of her witnesses testifying that it was filled up level with the street and looked like the rest of the street which was wet and muddy from the rain, and the defendant's witnesses contradicting this.

The first question is whether the plaintiff was in the exercise of due care.

We think that it could not be ruled as matter of law that she was not. The street, as already observed, was not closed to travel. The street cars were running through it, and teams and travellers were passing on the side opposite to that on which the building was in the process of erection. The obstructions extended only to the first track, and were not such in character or extent as necessarily to show the plaintiff that in attempting to pass through the street she did so at her own peril. *Sampson* v. *Boston*, 184 Mass. 46. *Leonard* v. *Boston*, 183 Mass. 68. *Butman* v. *Newton*, 179 Mass. 1, 9. *White* v. *Boston*, 122 Mass. 491. The circumstances were materially different from those in the cases of *Jones* v. *Collins*, 177 Mass. 444, and *Compton* v. *Revere*, 179 Mass. 413, relied on by the defendant city, and which are, therefore, not applicable. The plaintiff testified amongst other things that she was prevented from passing along the sidewalk or between the sidewalk and the tracks by reason of the

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obstructions, that she took what she thought was the best and nearest way and was looking down and ahead to see where she could walk best, when she stepped into the mudhole, and that she did not see any barrier or hear any warning. The testimony, as already observed, was contradictory as to the nature and extent of the barriers or notices and what and where they were, and also on the question whether any warning was given. It seems to us clear that the question whether she was in the exercise of due care should have been left to the jury. So also we think should the question, which is the next one, whether the defendant city exercised reasonable care and diligence to keep the street safe for travellers. So far as the street was suffered to remain open for travel, it was the duty of the city to take proper precautions to guard against accidents, and to render it safe, and this duty applied to that portion which was occupied by the railway tracks as well as to that portion which was not. *Hawks* v. *Northampton*, 116 Mass. 420. *Lawrence* v. *New Bedford*, 160 Mass. 227. *Fowler* v. *Gardner*, 169 Mass. 505. The rule is different in regard to steam railroads. A city or town is not bound to keep in repair that portion of a street or highway occupied by the tracks of a steam railroad, and is not liable to any one injured by a defect therein. *Rouse* v. *Somerville*, 130 Mass. 361, and cases cited. *Dickie* v. *Boston & Albany Railroad*, 131 Mass. 516. *Scanlan* v. *Boston*, 140 Mass. 84. *Mack* v. *Boston & Albany Railroad*, 164 Mass. 393. The city had notice or at least could be found to have had notice of the existence of the trench, and of the circumstances under which it was being dug and was bound to take reasonable precautions for the safety of travellers. *Prentiss* v. *Boston*, 112 Mass. 43. *Blessington* v. *Boston*, 153 Mass. 409. *Fox* v. *Chelsea*, 171 Mass. 297. Whether it did so and whether the matter complained of constituted a defect and caused the injuries complained of were questions for the jury.

So far as the railway was concerned, it was under no obligation to keep the street in repair generally, or to see that the trench was guarded or lighted, or that reasonable precautions were taken for the safety of travellers. It was only bound to keep in repair "the paving, upper planking, or other surface material" of the portions of the street occupied by its tracks,

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if the street was paved, and, if unpaved, as was the case here, an additional space of eighteen inches on each side of its tracks. Pub. Sts. c. 113, § 32. *Leary* v. *Boston Elevated Railway*, 180 Mass. 203.

So far as applicable to street railways generally this provision was repealed by St. 1898, c. 578, § 26. But it was expressly provided that the provisions of that act should not apply to the Boston Elevated Railway Company for twenty-five years from June 10, 1897. The law that was applicable at the time of the accident remains in force therefore so far as the railway company is concerned. Under that law, as already observed, it was bound to keep in repair the surface of Roxbury Street so far as included in its tracks and a distance of eighteen inches outside of them. The evidence was contradictory as to how far the trench had been filled when the plaintiff sank into it. The plaintiff and some of her witnesses testified that it had been filled level with the street within the location of the defendant's track. The testimony of the witnesses for the city tended to show that there was a hole there, and left it uncertain to what extent the trench had been filled up. The railway company's duty to repair did not begin till the trench had been filled up to a point where the company became responsible for the condition of the portions of the street that were occupied by its tracks (*Leary* v. *Boston Elevated Railway*, *ubi supra*); in other words till it had been filled to a point, where what might be properly described as the surface began. Whether the filling had reached that point was plainly a question of fact for the jury. Unless it had the railway company was not liable. If it had reached that point, then, there would remain the further questions, also for the jury, whether the railway company was or was not negligent in attending to the duty of repair thus imposed upon it, or in providing for the safety of travellers along that portion of the street, and, if it was negligent, whether its negligence contributed to the plaintiff's injury.

For these reasons without considering other matters that have been argued by the plaintiff we think that the exceptions must be sustained as to both defendants. *So ordered.*

M. J. Creed & J. P. Crosby, for the plaintiff.

P. Nichols, for the city of Boston.

E. P. Saltonstall, for the Boston Elevated Railway Company.

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HENRY H. POTTER & others *vs.* MARY S. KIMBALL, administratrix, & others.

Essex. November 4, 1903. — June 21, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Equity Jurisdiction, Equitable mortgage, Laches. *Trust. Frauds, Statute of. Limitations, Statute of.*

If a creditor with the consent of his debtor takes on execution and also by a judgment on a writ of entry certain real estate of the debtor to hold as security for the debt, an equitable mortgage is created which will be enforced in equity as a trust.

The statute of frauds is no defence to a bill in equity to establish an oral trust by showing that the defendant holds certain real estate as an equitable mortgage or in trust for the plaintiff on being paid the debt for which it is held as security.

Where one holds real estate by an absolute legal title subject to an oral trust which makes him in equity a mortgagee, the statute of limitations does not begin to run against the equitable mortgagor until the equitable mortgagee repudiates the trust.

The mere fact that for a period of twenty years no bill in equity was brought to establish an oral trust in real estate held by an absolute legal title does not amount to laches, if during the whole of that period the trust was recognized by the parties and the delay was not accompanied by any change for the worse in the situation of the holder of the legal title.

BILL IN EQUITY, filed March 1, 1902, by the heirs at law of John H. Potter and the administrator of his estate against the widow and heirs at law of William B. Kimball, to establish a trust in certain real estate in Topsfield, and for an accounting, alleging, that the real estate was worth about $4,000 and was transferred as security for an indebtedness of Potter to Kimball of $765.31, having been taken by Kimball with the consent of Potter by attachment and purchase at execution sale in 1881 and also by a judgment on a writ of entry in 1882, that Kimball died intestate on September 17, 1888, and Potter died intestate on October 1, 1901, having for a period before his death become infirm in body and mind and finally of unsound mind and incapable of attending to business, with further allegations, which are described in the opinion, as to the property having been held by

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Kimball during his life and by Kimball's widow and heirs after his death subject to the equitable claims of Potter and after his death of the plaintiffs.

In the Superior Court the defendants demurred on the grounds stated in the first paragraph of the opinion. The case was heard by *Holmes*, J., who made a decree sustaining the demurrer and dismissing the bill. The plaintiffs appealed.

The case was argued at the bar in November, 1903, before *Knowlton*, C. J., *Morton*, *Barker*, *Loring*, & *Braley*, JJ., and afterwards was submitted on briefs to all the justices.

A. P. White (*G. C. Richards* with him,) for the plaintiffs.

E. J. Powers, for the defendants.

MORTON, J. This case comes here on appeal by the plaintiffs from a decree sustaining the demurrer and ordering the bill to be dismissed. The grounds of demurrer were first the general one of want of equity, and then, in the order stated, laches, the statute of limitations, the statute of frauds, and a complete and adequate remedy at law. The ground or grounds on which the demurrer was sustained and the bill dismissed are not stated anywhere in the record, and there is no waiver on the part of the defendants of any of the causes of demurrer, though the defence principally relied on is that of laches. This renders it necessary to consider them all.

1. As to want of equity. It seems to us that, fairly construed, the bill states a case for equitable relief. It alleges in substance that pursuant to an understanding between Potter and Kimball the latter acquired title through legal proceedings, first by a writ of summons and attachment and then by a writ of entry, to the property in question, for the purpose of holding it as security for what should appear upon a final settlement and accounting between Potter and himself to be due from Potter to him, and that Kimball continued to so hold the property during his life, and that after his death the widow and heirs so held it and treated it as long as Potter lived, and that the present holders of the title took it with full knowledge of all the facts and circumstances under which Kimball acquired and held the title, and that they dealt with the property on a like footing during Potter's lifetime. Without here going into a detailed analysis of the bill or a recital of its various allegations, it seems

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to us, as we have said, that, fairly considered, this is what in substance and effect it alleges. So considered, the bill sets out a case in which the defendants hold the title by way of equitable mortgage, or in trust for the benefit of Potter's heirs upon being paid what upon a final accounting shall appear to be due. *Campbell* v. *Dearborn*, 109 Mass. 130. 1 Perry, Trusts, (5th ed.) §§ 166 *et seq.* The fact that in the summons and attachment suit the execution was returned satisfied by a levy on the property, and in the writ of entry execution for possession was issued, served and returned, would not prevent the transaction from being treated according to its real nature as a mortgage. *Cullen* v. *Carey*, 146 Mass. 50.

2. If the defendants hold the property by way of equitable mortgage, or, what amounts to the same thing, in trust for Potter's heirs upon being paid what shall appear to be due, it is manifest that the statute of frauds is not a defence. *Campbell* v. *Dearborn*, *ubi supra.*

3. Neither is the statute of limitations a defence. According to the allegations of the bill there was no repudiation of the mortgage or trust till after Potter's death in 1901, and the statute would not begin to run till such repudiation occurred. *Jones* v. *McDermott*, 114 Mass. 400, 403.

4. The defence principally relied on is laches. Potter delayed during his lifetime to take steps to enforce his rights, but so far as appears from the allegations of the bill, the delay did not operate in any way to the prejudice of Kimball or of his estate. On the contrary according to the allegations of the bill Kimball recognized his obligation to account for the property during his life, and after his death those representing his estate recognized it during Potter's life. One of the parcels conveyed to Kimball was sold by Kimball's heirs in 1890 with Potter's assent and the proceeds applied towards Potter's indebtedness. Potter's condition during the latter part of his life, as alleged in the bill, also furnished some excuse, if excuse were needed, for the delay. Delay unaccompanied by any change for the worse in the situation of the parties, and acquiesced in by those interested with a continuous recognition on their part of the real nature of the transaction, does not furnish of itself any sufficient reason for refusing the relief asked for. Story, Eq. Jur. § 1520 *a*. It is

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not contended that since Potter's death there has been any unnecessary delay in instituting proceedings.

The result is that, in the opinion of a majority of the court, the decree must be reversed and the demurrer overruled.

So ordered.

CHARLES H. DUNNING *vs.* THEODORE C. BATES & another.

Suffolk. January 21, 1904. — June 21, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Equity Jurisdiction, Laches, Acquiescence, Accounting. *Equity Pleading and Practice*, Parties. *Corporation.*

In a suit in equity for an accounting, by a bondholder for himself and other bondholders against trustees appointed by the bondholders to enforce the mortgage securing the bonds and turn over the property to a new corporation to be organized for the purpose, if the plaintiff was ignorant of the matters complained of and had no notice to put him on inquiry until shortly before the filing of his bill, there can be no defence of laches, nor is it a defence that in such ignorance he accepted securities of the new corporation in satisfaction of his claim.

In a suit in equity for an accounting, by a bondholder for himself and other bondholders against trustees appointed by the bondholders to foreclose the mortgage securing the bonds and turn over the property to a new corporation to be organized for the purpose, alleging that such a corporation was formed but that the defendants failed to turn over to it a part of the proceeds of the property that came into their hands as trustees, and were guilty of negligence or misfeasance causing loss to the plaintiff, the new corporation is not a necessary party. HAMMOND & BRALEY, JJ. dissenting.

KNOWLTON, C. J. The plaintiff was the holder of certain bonds, a part of an issue amounting to $1,000,000, at their face value, which were secured by mortgages of land in Missouri, and were known as the bonds of the North Side Land and Mortgage Company. Default having been made in the payment of principal and interest due on these bonds, the defendants were appointed trustees to obtain a foreclosure of the mortgages, and to organize a new corporation to buy the lands and hold them for the benefit of the original bondholders, who were to become the stockholders of the new corporation. The defendants have executed the trust in most particulars, but the

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plaintiff alleges that they have failed to account for a part of the proceeds of the property that came into their hands, and that they have been guilty of negligence or misfeasance in the performance of their duties, whereby he and the other bondholders whom they represented have failed to receive all that they were entitled to. He brings this bill for himself and such other of the original bondholders as shall become parties thereto, and prays for an account, and that the balance found due shall be paid to the plaintiff, and the others in whose behalf this suit is brought. The defendants demurred, and stated as grounds of the demurrer, want of equity, laches, the want of proper parties, and that the plaintiff had accepted the securities of the new corporation in full satisfaction of his bonds of the North Side Land and Mortgage Company. The demurrer was sustained, and the case is here upon the plaintiff's appeal from the decree sustaining the demurrer and dismissing the bill.

The defence of laches and that the plaintiff has accepted the securities of the new corporation in full satisfaction of his claims, is met by the averments of the bill that "until on or about the 11th day of June, 1902, the plaintiff was wholly ignorant of the matters herein complained of, and had no knowledge thereof, and no reason to be put upon any inquiry thereof, but believed that the defendants had faithfully administered their said trusts, . . . and that, immediately upon the discovery of the matters herein complained of, the plaintiff made a written demand upon the defendants and each of them, for an account," etc.

The most important questions raised by the demurrer are whether the North Kansas City Land and Improvement Association, the new corporation, is a necessary party to the bill, and whether the right sought to be enforced is the right of that corporation, and not of the plaintiff and his associates. This last question is not necessarily whether there is a right founded on the alleged neglect or misfeasance which may be enforced by the new corporation; but whether there is such a right which belongs to the plaintiff and his associates, and which may be enforced by them. On this part of the case, we are of opinion that the plaintiff's contention is correct. The defendants were trustees by appointment of the original bondholders; the plaintiff and his associates are the *cestuis que trust* to whom they are

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accountable. They on one side and the defendants on the other were the only parties to the contract or arrangement on which the rights of the parties depend. The organization of a new corporation was to be a part of the machinery which they devised, by which to serve the interests of the bondholders. This corporation to be created was not a party to the trust, and cannot be made a party to the trust, for it was not in existence when the trust was created. *Abbott* v. *Hapgood*, 150 Mass. 248, 252, and cases there cited. Neglect or misfeasance of the trustees is a breach of duty toward the *cestuis que trust*, for which they are entitled to a remedy directly against the trustees, under the agreement to which they and the trustees were the only parties. A failure to turn over to the new corporation all that ought to be turned over is not a breach of contract with the new corporation. It is a breach of contract with the bondholders, and an abuse of their trust and confidence. We have no doubt that the bondholders may proceed directly against the trustees to obtain a remedy for a failure to account in a case of this kind. This seems to have been assumed without question in other somewhat similar cases. *King* v. *Barnes*, 109 N. Y. 267. *White* v. *Wood*, 129 N. Y. 527. *Coppell* v. *Hollins*, 91 Hun, 570. *Matthews* v. *Murchison*, 15 Fed. Rep. 691. *First National Bank of Chattanooga* v. *Radford Trust Co.* 80 Fed. Rep. 569. *Venner* v. *Fitzgerald*, 91 Fed. Rep. 335.

The question whether the new corporation should be a party to this suit, depends upon whether the corporation, as an independent entity, has any standing in reference to this trust, except as the creature of it, representing no one but the bondholders. It seems that it is but an instrument, created solely for their use and benefit. No one else has any interest or ownership in it. Such as it was, it passed into their hands as stockholders. If any of the stock has since been sold, the purchasers took it as it was, and acquired no interest in property which, as between the plaintiff and the defendants, ought to have been turned over to it, but was not. The price which they paid for their stock, presumably, was founded on the condition of the corporation as it was, not upon what it might have been if these defendants had performed their whole duty. This corporation has been in existence almost six years. It would be an injustice to the

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original stockholders, the *cestuis que trust*, if, having held their stock for years, and then having sold it to persons who had no rights under the trust, these persons could now come in and acquire, through the corporation, that which the corporation never owned, and that which should have benefited the bondholders by making the corporate property more valuable than it was when the stock was sold. The corporation not having been in existence, and not having been a party to the trust arrangement, and having no relation to it except as it was held and used for the *cestuis que trust*, for their own benefit, and the new stockholders by purchase, if there are any, not having succeeded to the rights of the *cestuis que trust* under the original arrangement, but only to their property as stockholders in the corporation as it then was, we see no interest which the corporation as an independent party has in this suit, or which its stockholders who were not originally bondholders have as stockholders. Full justice will be done if the *cestuis que trust* receive, in that relation, that which otherwise they would have received as stockholders, if the trust had been properly administered.

Decree reversed; demurrer overruled.

HAMMOND, J. I dissent from so much of the foregoing opinion as respects the question raised by the demurrer whether the North Kansas City Land and Improvement Association is a necessary party to this bill.

Here was a trust by the terms of which the property coming to the hands of the trustees was to go to a corporation thereafter to be formed. The property came to the hands of the trustees, the corporation was formed and its stock was issued to the various bondholders in accordance with the terms of the trust. This bill is brought by one of the bondholders for himself and such other bondholders as shall become parties thereto. It alleges in substance that the trustees have not conveyed to the corporation all the property, but have fraudulently kept or diverted some of it, and asks for an accounting and that the trustees may be ordered to convey to the plaintiff property which under the terms of the trust should have been conveyed to the corporation.

It is to be noted that the plaintiff has not repudiated the trust. On the contrary he received his proper share of the stock of the

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new corporation, and the whole framework of the bill is to enforce a trust. It seems plain to me that under these circumstances the corporation as *cestui que trust*, and not the plaintiff, is entitled to the property which under the terms of the trust was to be conveyed to it, that as such *cestui que trust* it could maintain a bill to get it, and that therefore it should be made a party to this suit. To me it seems to be no answer to this to say that the corporation was no party to the original agreement, and indeed was not in existence at the time the trust was created. The proposition that a *cestui que trust* not in being at the time of the creation of the trust, or not a party to it at that time, should for that reason not be made a party to a suit brought, not in repudiation of the trust but to enforce the obligations of the trustees under it and affecting the rights of such a *cestui que trust*, seems to me utterly inconsistent with the principles of equity as daily administered in trusts created either by deed or by will. The true test of course is not whether the person whose rights are to be affected was one of the creators of the trust or in being when it was created, but whether during the continuance of the trust he has or may have a beneficial interest under it as *cestui que trust*.

Much less does it seem to me to be an answer to say that there has been or may have been a change in the personnel of the stockholders of the *cestui que trust*. The rights of the corporation are measured by the terms of the trust and not by the character or personnel of its stockholders.

Of course I do not mean to say that the plaintiff cannot call the trustees to account. Where the object does not affect the rights of any other *cestui que trust* than the plaintiff the bill undoubtedly may be maintained without joining the *cestui que trust* not concerned in the subject matter; but where, as in this case, the plaintiff seeks to hold the trustees upon the ground that they have not conveyed to the corporation, which is a *cestui que trust*, some portion of the property which by the terms of the trust they should have conveyed to it, a question is raised in which the corporation is interested; and unless it is made a party to this suit it is not bound by the final decree and can maintain an action to have the property conveyed to it in accordance with the terms of the trust. Thus the defendants may

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be obliged to meet two suits upon the same subject matter. In my judgment the only proper course is to make the corporation a party. Then a decree can be made which will place the property in accordance with the terms of the trust, and will work a final settlement among all parties interested.

I am authorized to state that Mr. Justice BRALEY concurs in this dissent.

The case was argued at the bar in January, 1904, before *Knowlton*, C. J., *Lathrop*, *Barker*, *Hammond*, & *Braley*, JJ., and afterwards was submitted on briefs to all the justices except *Loring*, J.

A. R. Weed, for the plaintiff.

W. B. Farr, for the defendant Theodore C. Bates.

BENJAMIN LANCY *vs.* CITY OF BOSTON & others.

Suffolk. January 27, 1904. — June 21, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Constitutional Law. Statute, Construction. *Tax*, Exemption, Sale.

St. 1896, c. 321, authorizing the commissioners appointed under St. 1890, c. 428, on a petition for the alteration of the grade crossings of the railroad of the Old Colony Railroad Company on Tremont Street in Boston, to prescribe the manner in which other grade crossings on the Providence division of the New York, New Haven and Hartford Railroad Company in Boston should be abolished, is not unconstitutional as an attempt of the legislative department to interfere in judicial proceedings, but merely gave the commissioners additional powers to be exercised under the direction of the court.

St. 1896, c. 321, authorized commissioners, previously appointed, to prescribe the manner in which certain grade crossings shall be abolished, and "to consider whether public necessity and convenience require any additional land to be taken for railroad and highway purposes in connection with the abolition of such crossings, and if so to prescribe the limits within which the same may be taken" and further provided that the acceptance of the supplemental report of the commissioners "shall be a taking of the land required to be taken for railroad and highway purposes, as therein specified." *Held*, that this gave the Superior Court authority in accepting the report of the commissioners to take the additional land required for the erection of a passenger station outside of the location of the railroad as designated in the report.

Land taken under the right of eminent domain for a highway or for railroad purposes is not taxable to the owner of the fee.

Land taken for a highway and for railroad purposes by a decree of the Superior

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Court accepting a report of commissioners under the provisions of St. 1896, c. 321, authorizing the abolition of certain grade crossings, cannot be taxed to the former owners although a copy of the decree is not filed in the registry of deeds until after the first of May when the tax is assessed.

A parcel of land was sold for taxes assessed upon the whole parcel. Before the assessment, by proceedings under a grade crossing act a part of the land had been taken for a highway and was exempt from taxation and another part had been taken for railroad purposes but was outside of the railroad location and was taxable to the railroad company. A third part still belonged to the owners from whom the other parts had been taken and to whom the whole parcel was assessed. *Held*, that the sale was void, as no part of the land was subject to a lien for the collection of one undivided tax on the three portions.

KNOWLTON, C. J. This case comes before us on a report from the court of land registration. The question is as to the validity of the title of the petitioner to a tract of land, a part of which was taken for a public street and a part for a railroad station of the New York, New Haven and Hartford Railroad Company, in connection with the abolition of grade crossings on the line of the railroad. The taking in each case was under the St. 1896, c. 321, and the first question raised is whether this statute is constitutional.

The petitioner contends that because the statute purports to authorize commissioners appointed by the Superior Court upon a petition for the abolition of the grade crossings of the Old Colony Railroad on Tremont Street in Boston, to prescribe the manner in which the other grade crossings on the Providence division of the New York, New Haven and Hartford Railroad Company in the city of Boston shall be abolished, it is unconstitutional, as an attempt of the legislative department to interfere in judicial proceedings. But this was not an attempt to interfere with judicial proceedings. The act simply gave the commissioners additional powers, to be exercised under the direction of the court, first, in reference to taking additional land for railroad or highway purposes, and secondly in reference to prescribing the manner of abolishing other grade crossings on another part of the railroad which was not included in the proceedings then pending. All the parties interested in the new proceedings authorized were then presumably before the court — if not they voluntarily came before the court — and there was nothing improper in the action of the commissioners, under the statute, without the filing of a new petition. They made a supplemental

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report in regard to the additional crossings and the taking of land, in accordance with the requirement of the statute. The action of the commissioners, and the action of the court upon the filing of their supplemental report, were a part of the judicial proceedings, and there is no valid objection to the statute or to these proceedings under it. *Mayor & Aldermen of Northampton, petitioners*, 158 Mass. 299. *Providence, Fall River & Newport Steamboat Co.* v. *Fall River*, 183 Mass. 535. *New London Northern Railroad* v. *Boston & Albany Railroad*, 102 Mass. 386. The St. 1890, c. 428, to which this is an addition, has been held constitutional. *Selectmen of Norwood* v. *New York & New England Railroad*, 161 Mass. 259. *Gately* v. *Old Colony Railroad*, 171 Mass. 494.

Land was taken for a public way in connection with the abolition of the crossing, and other land was taken outside of the location of the railroad five rods in width, for the construction of a new station required by public convenience and necessity in consequence of the abolition of the grade crossing. Upon the record before us, it does not plainly appear whether the land taken for highway purposes was for such a change as could be made, and as would require the taking of land, under the St. 1890, c. 428, and it is at least a grave question whether, under that statute, land could be taken for the erection of a passenger station outside of the location. The respondents in the present case find authority for the taking in that part of the St. 1896, c. 321, which authorizes the commissioners "to consider whether public necessity and convenience require any additional land to be taken for railroad or highway purposes in connection with the abolition of such crossings, and if so to prescribe the limits within which the same may be taken." The crossings referred to in this sentence are those which the commissioners had been authorized previously to consider and report upon. That the authority was ample to warrant the taking of lands in the abolition of these crossings is unquestioned. Whether the further provisions, giving the commissioners authority to prescribe the manner in which other grade crossings should be abolished, gave the court power, on their report, to take additional land for railroad or highway purposes, in connection with the proposed changes in these other crossings, is a question not free from diffi-

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culty. All parties before the court, as well as the commissioners themselves, seem to have assumed that they did. The Superior Court, by its decree confirming the report, so decided. On the whole, in view of the fact that the recommendations in regard to the additional crossings and the taking of the additional land were to be embodied in one supplemental report with a provision that "The acceptance of such supplemental report . . . shall be a taking of the land required to be taken for railroad and highway purposes," we are inclined to hold that the right to take additional land was, by implication, imported into the authority to prescribe the manner in which the other crossings should be abolished, and that the taking for the way and for the construction of the station was legal.

The report was accepted by a decree of the Superior Court on April 24, 1897. By the express terms of the statute this acceptance was a taking of the land which changed the title. By the St. 1890, c. 428, § 4, the clerk of the Superior Court was required to cause a copy of the decree to be filed with the commissioners and to be recorded in the registry of deeds for the county. The fact that it was not recorded until June 23, 1897, does not affect the rights of the parties. *Sykes* v. *Keating*, 118 Mass. 517, 519. *Orne* v. *Barstow*, 175 Mass. 193, 196. *Goff* v. *Britton*, 182 Mass. 293, 294.

The petitioner's title is under a sale for taxes assessed to the former owners on May 1, 1897, and we must consider the effect of such a tax upon the rights of the public and of the railroad company, previously acquired. Each of the titles created by the taking was only an easement, and the fee remained in the former owners. But the easement in each case gave paramount and practically exclusive rights in the land taken. An appropriation of land to the use of the public for a highway under the right of eminent domain creates an interest in the public which cannot be affected by a subsequent attempt to tax the land to the owner of the fee. The various provisions as to taxation of real estate and the collection of taxes are inapplicable to property held for such a public use. It has often been decided that lands appropriated to such uses are exempt from taxation. *Wayland* v. *County Commissioners*, 4 Gray, 500. *Essex County* v. *Salem*, 153 Mass. 141. *Worcester County* v. *Mayor & Aldermen*

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of Worcester, 116 Mass. 193. *Somerville* v. *Waltham*, 170 Mass. 160. *Boston* v. *Boston & Albany Railroad*, 170 Mass. 95, and cases there cited. *Miller* v. *Fitchburg*, 180 Mass. 32. These cases refer particularly to taxation of those who hold the title for the benefit of the public. We are not aware that there has ever been an attempt to tax the fee held by an owner of land which was taken and used for a highway or railroad, or that the court has in terms decided that the interest of the owner of the fee in such a case is exempt from taxation. But the implication from the cases is to that effect, and we are of opinion that when an easement in land taken for a public use involves practically the exclusive possession and control of the property by the public, and leaves the original owner with no right of substantial value, the property is exempt from taxation, although he remains the owner of the fee. It follows that the tax assessed to the Whittemores on May 1, 1897, upon that part of the land which had been taken for a public way, was invalid, and the petitioner by his purchase acquired no title to the property. *Mackall* v. *Chesapeake & Ohio Canal Co.* 94 U. S. 308. *Rich* v. *Braxton*, 158 U. S. 375. The fact that the Whittemores remained the owners of record did not affect the rights of the public or of the railroad company after a valid taking, and it gave the assessors no right to tax land devoted to such public uses.

The small portion of the land which was not included either in the taking for a public way or in that for railroad purposes was taxable to the Whittemores as owners, and under the R. L. c. 111, § 96, the land taken for railroad purposes being outside the location of the railroad five rods in width was taxable to the corporation. Each of the three parts into which the land was divided by the taking of portions for these different uses stood in a different relation to the law in regard to taxation. The six hundred and twenty-five feet which was left to the owners could be taxed in the ordinary way, and as that part of the tax was rightfully assessed, the owners, if an action at law had been brought against them for the collection of the whole tax, or if they had paid it under protest and brought an action to recover back the part improperly assessed, would have been without remedy, inasmuch as they had not applied for an abatement. *Howe* v. *Boston*, 7 Cush. 273. *Bourne* v. *Boston*, 2 Gray, 494. *Salmond* v. *Han-*

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over, 13 Allen, 119. But none of the land was subject to a lien which could be enforced by a sale for any other tax than that which was lawfully assessed upon it. *Hayden* v. *Foster*, 13 Pick. 492.

The sale was of the whole land for a single undivided tax upon the three portions. No part of the land was subject to a lien for that tax, and the sale was therefore illegal and void. The result is that the petitioner took no title, and his petition must be

Dismissed.

W. O. Childs, for the petitioner.

P. Nichols, for the city of Boston.

C. F. Choate, Jr., for the railroad companies.

GEORGIE S. LIVERMORE & another *vs.* COUNTY OF NORFOLK & another.

Norfolk. March 9, 1904. — June 21, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Damages. Way. Pleading, Civil, Parties.

A petition for damages from the "alteration of" a certain street in a town "by widening, straightening and relocation of the same, for the purpose of granting a location therein" for the tracks of a certain railway company, alleging that on a certain day the county commissioners adjudged "that the common convenience and necessity" required that the street should be "widened, straightened and relocated, as prayed for in said petition", is a petition for damages from an alteration of a highway to be paid by the county under R. L. c. 48, § 1, and not a petition for damages from the mere relocation of a highway which the county commissioners can order to be paid by the town under § 12 of the same chapter.

The misjoinder of a defendant in an action at law is not a good ground of demurrer for another defendant against whom a good cause of action is stated.

KNOWLTON, C. J. This is a petition for the assessment of damages from the taking of land by the county commissioners of Norfolk County for highway purposes. The petition is brought against the county of Norfolk and the town of Wellesley, and in accordance with the prayer of the petitioners, an order of

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notice was issued and served upon both of these parties, and they have appeared as respondents. The county of Norfolk demurred to the petition on the ground that it was brought against two parties as joint respondents, who could in no event be jointly liable, and that two such parties cannot properly be joined in one petition. The demurrer was sustained, an order was entered that the petition be dismissed, and the petitioners appealed to this court.

The proceedings of the county commissioners involved a change of location and a widening and change of grade of Worcester Street, a highway in Wellesley. From the recitals in the petition for assessment of damages, which are all that is before us to show the details of the proceedings, it is not plain beyond the possibility of question whether the commissioners were acting under the R. L. c. 48, § 1, and making an alteration of the highway, or under the R. L. c. 48, § 12, and merely relocating it. If they were acting under the former section the petition for the assessment of damages should be brought against the county of Norfolk, which would be liable under the R. L. c. 48, § 52; if under the latter the petition should be brought against the town of Wellesley, which was ordered by the commissioners to pay the expenses of the change, including the land damages. R. L. c. 48, § 12. The only question before us arises on the demurrer of the county. The town has filed no pleadings. Besides the ground of demurrer already stated, there is another in general form, namely, that the petition and the matters therein contained, in manner and form as therein stated, are not sufficient to enable the plaintiffs to maintain their petition against this defendant.

We will consider first, whether, apart from the fact that the town is joined, a good cause of action is stated against the county. That depends upon whether the statement of the proceedings before the county commissioners shows action under the R. L. c. 48, § 1. The recital is that the petition before them was for an "alteration of said Worcester Street," which, if it stood alone, would plainly bring the case within this section. It continues with words of more specific statement as to the petition and their action upon it, as follows, "by widening, straightening and relocation of the same, for the purpose of

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granting a location therein for the tracks of the Boston & Worcester Street Railway Company, did, on said third day of June, 1902, adjudge that the common convenience and necessity required that said Worcester Street be widened, straightened and relocated, as prayed for in said petition . . . and did establish the grade thereof," etc. We are of opinion, for reasons stated at length in *Watertown* v. *County Commissioners*, 176 Mass. 22, that this description shows an alteration of the highway rather than a mere relocation of it, and that therefore the damages for the land taken are to be paid by the county. The effect of an order that they should be paid by the town, in a case of this kind, was considered in *Ahearn* v. *Middlesex County*, 182 Mass. 518, which, as an authority, covers this part of the present case.

The petition sets forth a good cause of action against the county alone, and it does not set forth a cause of action against the respondents jointly. The only remaining question is whether the demurrer can be sustained on the ground that the town has been made a party. If the town had demurred, the case would be different, and the demurrer would be sustained, because no cause of action is stated against the town, and the town cannot be joined as a respondent with another party which alone is liable. But the rule is that misjoinder of another party is not a good ground of demurrer for a defendant against whom the record shows a good cause of action on a several liability. *New York & New Haven Railroad* v. *Schuyler*, 17 N. Y. 592, 604. *Brownson* v. *Gifford*, 8 How. Pr. 389. *Gutridge* v. *Vanatta*, 27 Ohio St. 366. *Bennett* v. *Preston*, 17 Ind. 291. *Betson* v. *State*, 47 Ind. 54. *Holzman* v. *Hibben*, 100 Ind. 338. *Webster* v. *Tibbits*, 19 Wis. 438, 448. *Truesdell* v. *Rhodes*, 26 Wis. 215. *Bronson* v. *Markey*, 53 Wis. 98. *Lewis* v. *Williams*, 3 Minn. 151. *Nichols* v. *Randall*, 5 Minn. 304. *May* v. *Jones*, 88 Ga. 308. Story, Eq. Pl. § 544.

The rule to the contrary stated in 1 Chit. Pl. (16th Am. ed.) 51, has not been followed. This is not a case in which there is a joinder of different causes of action against different defendants, and no such ground of defence is set up in the demurrer. A declaration or petition presenting such a case is demurrable in favor of either or both the defendants. *Trowbridge* v. *Forepaugh*, 14 Minn. 133.

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In the present case the misjoinder of the town in the petition is a defect in the proceedings, but it cannot be taken advantage of by the county in this way.

Judgment reversed; demurrer overruled.

C. E. Washburn, for the petitioners.

C. F. Jenney, for the county of Norfolk, submitted a brief.

JOHANNA A. FENTON *vs.* PATRICK KANE & trustee.

Hampden. April 1, 1904. — June 21, 1904.

Present: KNOWLTON, C. J., LATHROP, HAMMOND, LORING, & BRALEY, JJ.

Practice, Civil, Abatement.

Under R. L. c. 173, § 76, the decision of a judge of the Superior Court upon a plea in abatement is final.

CONTRACT for $16.50 for use and occupation of a tenement during June, July and August, 1903. Writ in the Police Court of Holyoke dated October 7, 1903.

The American Writing Paper Company, a corporation organized under the laws of New Jersey, was summoned as trustee by the delivery of a copy of the writ to its treasurer and of another copy to its paymaster. The alleged trustee pleaded in abatement, that it was a foreign corporation having a usual place of business at Holyoke and had complied with the provisions of St. 1903, c. 437, § 58, but that no service had been made upon the commissioner of corporations of the Commonwealth in accordance with the terms of that act. The defendant was defaulted.

On appeal to the Superior Court a judge of that court upon an agreed statement of facts ordered that the plea in abatement be sustained and the trustee be discharged. The plaintiff appealed.

T. B. O'Donnell, for the plaintiff.

C. L. Long, for the trustee.

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KNOWLTON, C. J. The question reported for our consideration is one of importance to the people of the Commonwealth. We have received intimations that, because it was submitted on an agreed statement of facts, with an expectation on the part of the judge and the counsel that the decision, whatever it might be, would come to this court for revision, the judge did not give the question so full consideration as he would have done had he supposed that his decision would be final. Even if this was so, we are unable to discover any jurisdiction in this court to deal with the question. It is provided in the R. L. c. 173, § 76, that decisions of a single justice "upon questions raised upon an answer or plea in abatement . . . shall be final." This statute has often been before the court, and has been applied in many cases to deprive this court of jurisdiction. *Guild* v. *Bonnemort*, 156 Mass. 522. *Burrows* v. *Morton*, 170 Mass. 569. *Smith* v. *Ferguson*, 168 Mass. 303. *Young* v. *Providence & Stonington Steamship Co.* 150 Mass. 550, and cases cited.

In its nature and substance as well as in its form, the pleading of the trustee is an answer or plea in abatement. Under our decisions such an answer, made by a trustee, is an answer in abatement, like a similar answer made by a principal defendant. *Thayer* v. *Ray*, 17 Pick. 166. *Hooper* v. *Jellison*, 22 Pick. 250. This being an answer or plea in abatement, the decision of the single judge was final, and we cannot properly consider the question which the parties have attempted to present to us.

In *Harris* v. *Doherty*, 119 Mass. 142, it appears from the original papers, and one would infer from the report, that no question of jurisdiction was referred to by the parties or considered by the court. The trustee's motion in that case was not an answer or plea in abatement, for it contained no averment of anything that did not appear of record. It is doubtful whether it was a motion to dismiss; still less does it appear to be a motion to dismiss for defect of form of process.

It is very plain that the case does not change the law stated in *Hooper* v. *Jellison* and in *Thayer* v. *Ray*, *ubi supra*.

Appeal dismissed.

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SHUBAEL D. SMITH, executor & trustee, *vs.* WILLIAM C. SMITH & others.

Essex. November 4, 1903. — June 22, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, LORING, & BRALEY, JJ.

Devise and Legacy, Construction.

A bequest to the brothers and sisters of the testator, after a life interest in one of them, means a bequest to the brothers and sisters of the testator living at the time of his death including the beneficiary for life, unless there is something in the will to show a different intention.

A testatrix bequeathed a certain sum of money to a trustee as follows: "in trust for N. R. wife of H. R., . . . the interest of said sum to be paid to her annually and in case of the death of H. R. the principal to be paid to her thus terminating the trust. In case of the death of N. R. before the death of her husband the property is to be paid to the brothers and sisters of the testator." N. R., who was a sister of the testatrix, died before her husband. A brother of the testatrix died after the testatrix and before N. R. *Held*, that the bequest in remainder, contingent on the death of N. R. before her husband, was to the brothers and sisters of the testatrix living at the time of her death including the deceased brother and N. R.

LORING, J. Frances H. Goldsmith by her last will bequeathed $8,000 to the plaintiff "in trust for Naomi B. Richmond wife of Henry Richmond of New Bedford . . . the interest of said sum to be paid to her annually and in case of the death of Henry Richmond the principal to be paid to her thus terminating the trust. In case of the death of Naomi B. Richmond before the death of her husband the property is to be paid to the brothers and sisters of the testator."

The plaintiff duly qualified as trustee. Naomi died during the lifetime of her husband.

This is a bill asking the court to instruct the trustee upon the distribution of the corpus of the trust fund among the remaindermen.

At the death of the testatrix there were three brothers, the plaintiff Shubael D. Smith, William C. Smith and Laurance S. Smith, and two sisters, Laura J. C. Smith and the life tenant Naomi B. Richmond. Laurance S. Smith died before Naomi B. Richmond the life tenant. The surviving brothers and sister claim that they are now entitled to the trust fund. On a petition

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for instructions brought by the trustee, the Probate Court made a decree directing the fund to "be equally divided among all the brothers and sisters of the testatrix who were living at the time of her death, that is to say, said fund shall be divided between William C. Smith, Laura J. C. Smith, Shubael D. Smith and the administrators of the estates of Naomi B. Richmond and Laurance S. Smith, both said Naomi B. Richmond and Laurance S. Smith, having deceased, since death of testatrix." From this decree William C. Smith took an appeal to the Supreme Judicial Court. The decree was affirmed there, and from that decree William C. Smith appealed to this court.

We are of opinion that the decree was correct.

A will ordinarily speaks from the death of the testator. A gift to brothers and sisters of the testatrix means a gift to those persons who come within that description at her death unless there is something to show that that was not her meaning. The fact that the gift is of a remainder, that is to say, is a gift of property subject to a life estate, does not show a contrary meaning. This is established in the cases of gifts of a remainder to heirs at law. The last case on that point is *Pierce* v. *Knight*, 182 Mass. 72. The fact that by such a construction the life tenant is brought within a class among which the remainder is to be divided, does not show a contrary meaning. *Abbott* v. *Bradstreet*, 3 Allen, 587. *Minot* v. *Tappan*, 122 Mass. 535. *Cushman* v. *Arnold*, 185 Mass. 165. Where, by that construction, the life tenant is the only person in whom the remainder vests, a case is presented where it is more difficult to determine the meaning of the testator. See *Welch* v. *Brimmer*, 169 Mass. 204.

There is nothing in this will to lead us to the conclusion that in her bequest to her brothers and sisters subject to the life estate to Naomi the testatrix did not mean those who were her brothers and sisters at the date of her death.

Decree affirmed.

R. F. Raymond, for William C., Shubael D. and Laura J. C. Smith.

R. A. Terry, for the administrator of the estate of Naomi B. Richmond and for the administratrix of the estate of Laurance S. Smith.

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MABEL W. GLIDDEN *vs.* EMMA F. NASON & another.

Essex. November 4, 1903. — June 22, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, LORING, & BRALEY, JJ.

Mortgage, Of chattels. *Words*, "Household furniture."

A mortgage of furniture in a boarding house of twenty-three rooms carried on by a husband and wife, including furniture which had belonged to the wife before they kept the boarding house and was in seven or eight rooms used for living purposes by the husband and wife and their family, includes "household furniture", within the meaning of St. 1892, c. 428, § 3, (R. L. c. 102, § 58,) and if the mortgage is at a greater rate of interest than eighteen per cent per annum and does not comply with the requirements of that statute it is wholly void. *Whether* in such a case the furniture in the rooms used by the boarders is "household furniture" within the meaning of the statute above cited as it would be for the purpose of exemption from taxation to the amount of $1,000 under R. L. c. 12, § 5, cl. 11, *quære*.

REPLEVIN for certain personal property alleged to have been mortgaged by the defendants to the plaintiff. Writ in the Police Court of Lynn dated August 22, 1898.

The answer alleged that the instrument relied upon by the plaintiff was void because it was executed as a mortgage of household furniture made to secure a loan on which interest was charged at a rate exceeding eighteen per cent per annum and did not state with substantial accuracy either the rate of interest to be paid or the actual expense of making and securing the loan as required by St. 1892, c. 428, § 3.

On appeal to the Superior Court the case was tried before *Stevens*, J., without a jury. He found that the instrument in question was a mortgage of household furniture and was void because it was in violation of St. 1892, c. 428, § 3. He found for the defendants, assessed the damages in the sum of $1, and ordered that judgment be entered for a return of the goods. At the request of the plaintiff he reported the case for determination by this court. If his finding was correct, judgment was to be entered on the finding; otherwise, judgment was to be entered for the plaintiff.

R. L. Sisk, for the plaintiff.

A. B. Tolman, for the defendants.

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LORING, J. The evidence in this case warranted a finding that the mortgage covered not only the furniture used by the former occupant of the Nason House in carrying it on as a boarding house, and bought by the defendants for the same use, but also the furniture of seven or eight rooms out of the twenty-three which the house contained, which seven or eight were occupied by the defendants and their family when the female defendant was employed as housekeeper by the former occupant of the house, and that the furniture of these seven or eight rooms was owned by the female defendant before the defendants bought the furniture of the house; and further that when the mortgage in question was made, one of the defendants told the plaintiff that she and her family were using seven or eight rooms for living purposes.

The furniture of the seven or eight rooms was household furniture within St. 1892, c. 428, § 3, now R. L. c. 102, § 53. We are of opinion that the whole mortgage was made void by its being included in it.

It is not necessary to consider whether the doctrine applied to the exemption from taxation of household furniture to the amount of $1,000 in *Day* v. *Lawrence*, 167 Mass. 371, applies to R. L. c. 102, § 53.

The only doubt we have had is whether the finding made by the presiding judge can be supported on the ground above stated or whether it must be taken to have been a finding that all the furniture was household furniture. We are of opinion that it may be construed to be the former, and that it need not be taken to be only the latter.

Judgment on the finding.

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BARNETT ITZKOWITZ *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Middlesex. November 9, 1903. — June 22, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Negligence, Contributory, On highway.

One who in the middle of the day is walking on a narrow plank walk extending along a temporary structure built out into a city street in front of a building in process of construction, and, to pass a man on the plank, steps directly in front of an electric car approaching from the opposite direction, which he could not have failed to see if he had looked, cannot be found to have been in the exercise of due care.

TORT for injuries from being run down by an electric surface car of the defendant. Writ dated September 12, 1901.

In the Superior Court the case was tried before *Bishop*, J. It appeared that the plaintiff was injured by coming in contact with a car of the defendant which was going in a southerly direction on Atlantic Avenue in Boston, about one o'clock P. M., on March 11, 1901. On the west side of the avenue was a temporary wooden structure, which had been erected by contractors who were putting up a new building, and which extended from the westerly line of the avenue across and six feet beyond the sidewalk into the street. Along the easterly front of this structure was a temporary plank walk one foot and eight inches wide, the outer edge of which was two feet two and one half inches from the westerly car rail of the defendant's railway. This plank walk connected with another temporary plank walk two feet six inches wide leading from the end of the temporary structure to the sidewalk. The shop from which the plaintiff started adjoined the temporary structure on the south.

The plaintiff testified that he went to Goldberg's shop on Atlantic Avenue, and left it to go to Union Street, "so when I was coming right from the sidewalk I was taking the plank board to go towards home this way, and I was meeting there a man that come side of this rail, and I twisted this way around him, and the car struck me and knocked me helpless, — I was n't knowing where I was. That's all I know."

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The judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

C. C. Nichols, for the plaintiff.

G. L. Mayberry, for the defendant.

KNOWLTON, C. J. There was very little if any evidence that the car was running otherwise than in the usual way, or that there was any negligence on the part of the defendant. But we will assume in favor of the plaintiff that he properly might have gone to the jury on this part of his case. The important question is whether there was evidence that the plaintiff was in the exercise of due care. Upon the undisputed testimony, he came out of a shop in the middle of the day and stepped directly in front of the car as he was starting to pass through the street towards the north, while the car was coming to meet him moving towards the south. If he was in the exercise of care, he could not fail to see that he was close by the track of a street railway, and that a car might be expected to pass over it towards the south at any moment. The obstruction built over the sidewalk made it impossible for him to see up the track until he reached the corner; but as soon as he was there, and before he reached the point of danger, the track for a long distance was directly before him, open to his view.

In his testimony and that of his witnesses, there is nothing by way of justification or explanation of his act in stepping within the line of passage of the moving car when he could not fail to see it without shutting his eyes, and when it would seem as if he should have heard it. The only reasonable explanation of the accident is that the plaintiff hurriedly, and thoughtlessly and carelessly stepped in front of the car, without giving any attention to his safety, in a crowded street. In some of its aspects the case is like *Hall* v. *West End Street Railway*, 168 Mass. 461. See also *Kelly* v. *Wakefield & Stoneham Street Railway*, 175 Mass. 331; *Hurley* v. *West End Street Railway*, 180 Mass. 370; *Creamer* v. *West End Street Railway*, 156 Mass. 320; *Mathes* v. *Lowell, Lawrence, & Haverhill Street Railway*, 177 Mass. 416. We are of opinion that there was no evidence that the plaintiff was in the exercise of due care.

Exceptions overruled.

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THOMAS M. RUMNEY *vs.* DANIEL E. WORTHLEY.

Middlesex. November 10, 1903. — June 22, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Libel, Publication.

Although sending a libellous letter by mail to the person libelled with no reason to suppose that it will be opened and read by anybody else before he has received it is not a publication which will support a civil action for libel, yet if the sender of the letter has good reason to believe that it is likely to be opened by an authorized person other than the person libelled, and this happens, the mailing is a publication.

In an action for libel, it appeared, that the defendant wrote a libellous letter addressed on a business envelope to the plaintiff at the plaintiff's dwelling house and that the letter was opened and read by the plaintiff's daughter in a grocery adjoining the dwelling house kept by the plaintiff's wife who had filed a certificate that she was doing business as a married woman, that the plaintiff conducted the business as her agent and that his daughter was a clerk in the grocery and opened and read the plaintiff's business letters, that the defendant had come to the grocery a great many times for the purpose of selling goods and that during the year before the receipt of the letter he had seen the daughter at least two or three times receive mail addressed to her father and open it in his presence, and that he had seen her after opening the letters walk with them to her father and show him their contents. *Held*, that there was evidence of publication of the libel.

TORT for alleged libel contained in two letters mailed by the defendant in January, 1901, and addressed to the plaintiff. Writ dated May 18, 1901.

At the trial in the Superior Court before *Gaskill*, J., it was admitted that the defendant wrote and mailed the letters and that they were libellous. It appeared that the letters were opened and read by the plaintiff's daughter. The evidence in regard to publication is described in the opinion.

At the close of the evidence, the judge ordered a verdict for the defendant on the ground that there was no publication of the letters by the defendant, and reported the case for determination by this court. If the ruling of the judge was correct, judgment was to be entered on the verdict; if not correct, the verdict was to be set aside and a new trial granted.

J. H. Morrison, for the plaintiff.

J. J. Kerwin, for the defendant.

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KNOWLTON, C. J. The only question reserved in this report is whether there was any evidence of publication of the libels, or either of them, contained in the two letters addressed by the defendant to the plaintiff. These letters were sent by mail in the ordinary way, addressed to the plaintiff at No. 12 Burtt Street, Lowell, which was his place of residence. His wife conducted a grocery store which was attached to the dwelling house, at No. 14 Burtt Street, she having filed a certificate, under the provisions of the Pub. Sts. c. 147, § 11, that she was doing business as a married woman. The plaintiff acted as her agent in conducting the business, and his daughter, twenty-three years of age, was a clerk in the store.

Sending a libellous letter through the mail to the person libelled, with no reason to suppose that it will be opened and read by any one else before he has received and read it, is not a publication which will support a civil action for libel. *Clutterbuck* v. *Chaffers*, 1 Stark. 471. *Delacroix* v. *Thevenot*, 2 Stark. 63. *Robinson* v. *Jones*, 4 L. R. (Ir.) 391. *Fonville* v. *M'Nease*, Dudley, (S. C.) 303. *Fry* v. *McCord*, 95 Tenn. 678. *Sylvis* v. *Miller*, 96 Tenn. 94. *Spaits* v. *Poundstone*, 87 Ind. 522. *McIntosh* v. *Matherly*, 9 B. Mon. 119. *Warnock* v. *Mitchell*, 43 Fed. Rep. 428. In criminal prosecutions for libel, the rule is generally held differently. The question in this case is whether there was any evidence which would have warranted the jury in finding that the defendant believed, or had good reason to believe, that the letters might be opened and read by the plaintiff's daughter in his absence, and that she was authorized to open her father's letters. The question of difficulty is whether there was evidence that the defendant was aware that she was accustomed or authorized to read such letters, addressed to her father. On this point the testimony is very unsatisfactory. She testified that she had known the defendant for five years; that he came to the store a great many times for the purpose of selling goods; that during the year immediately prior to the receipt of these letters he had seen her at least two or three times receive mail addressed to her father and open it in his presence; that she knew this had happened several times, and that she could not state the exact number of times; that he had seen her, after opening the letters, walk with them to her father and show him the contents of them.

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Without repeating her testimony on this point, which was of considerable length, we are of opinion that the jury fairly might have inferred from it that, as clerk in the store which was owned by her mother and conducted by her father, she was accustomed to open letters addressed to him, at least if they looked like letters pertaining to the business, and that the defendant knew it. Printed on the face of the libellous letters were these words: "In five days return to D. E. Worthley, 27 Canada Street, Lowell, Mass." This was the defendant's business address. We infer that the letters appeared externally like the ordinary business letters of the defendant. We do not attach much importance to the fact that they were addressed to No. 12 Burtt Street instead of No. 14 Burtt Street, for the dwelling house and store were connected. If the case stood upon the testimony in direct examination, we should think the jury well might infer knowledge on the part of the defendant that the plaintiff's daughter was accustomed to open letters which looked like these, and, with considerable hesitation, we are inclined to think that the cross-examination, taken in connection with the direct examination, would warrant the jury in coming to the same conclusion. If he sent the letters, having good reason to believe that they were likely to be opened by an authorized person other than the plaintiff, his sending them by mail was a publication.

Verdict set aside.

JOHN L. HUNT *vs.* SARAH F. HILL.

Middlesex. November 10, 1903. — June 22, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Practice, Civil. Nonsuit.

Where in an action in the Superior Court an auditor has been appointed under R. L. c. 165, § 55, and upon application of the defendant the court under § 59 of the same chapter has appointed a certain day for the hearing of the case, and the plaintiff after notice fails to appear at the hearing and likewise fails to appear at successive adjournments of the hearing made necessary by his absence, of each of which he was notified, this furnishes good ground for ordering a nonsuit in accordance with the provisions of the section last named.

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CONTRACT for $2,500 for alleged professional services and expenses. Writ dated February 4, 1899.

In the Superior Court *Aiken*, J. ordered a nonsuit to be entered, and reported the case for determination by this court. The previous proceedings in the Superior Court are stated in the opinion. If on the report the order was justified, it was to remain in effect; otherwise, the order was to be vacated and the case was to stand for trial.

J. L. Hunt, pro se, submitted a brief.

C. Cowley, for the defendant.

KNOWLTON, C. J. After the demurrer in this case was overruled, the answer was rightly filed by leave of the court. R. L. c. 173, § 17. An auditor was appointed under the authority of the R. L. c. 165, § 55, and a rule was duly issued upon the application of the defendant, and the court appointed a day for the hearing of the case. R. L. c. 165, § 59. The plaintiff was notified of this hearing, and knew that the court had ordered the hearing to be had on the day stated. The plaintiff was in Lowell on the day appointed, which was the place where the hearing was to be had, and knew of the time and place of the hearing. But he did not appear before the auditor, nor send any one to represent him. This was on August 26, 1902, and because of the plaintiff's absence the hearing was adjourned to August 27. The plaintiff was notified in writing of this adjournment, but he was not present in person or by attorney at the time appointed. In like manner and for a like reason, the hearing was adjourned to August 28, and from that day to September 3, and then to September 5, and from September 5 to September 10. The plaintiff was duly notified of these adjournments, but at no time did he appear before the auditor personally or by any representative. He attempted unsuccessfully from time to time, by motion before the Superior Court, to obtain a revocation of the order for a hearing before the auditor, and to obtain other orders. These facts were proved before a judge of the Superior Court, the auditor having reported to that court the plaintiff's neglect. The judge found that the plaintiff had neglected to appear at the time appointed for the hearing and at the time of the adjournments thereof, without good cause, and, upon the defendant's motion, ordered a nonsuit to be en-

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tered against the plaintiff, in accordance with the provisions of the R. L. c. 165, § 59.

The finding of the judge was well warranted and the order was properly entered. The case is within the exact terms of the statute, and calls for no extended consideration.

Nonsuit to stand.

ELLEN LYNCH *vs.* CITY OF BOSTON.

Suffolk. November 13, 1903. — June 22, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Way, Defect in highway.

If a woman, living in a house which the city has moved back with other houses from the sidewalk under an order for widening the street to make a boulevard, in passing over the unfinished portion of the street between her house and the sidewalk strikes her foot against a board projecting a little above the surface, she cannot recover from the city for injuries thus caused, the city not being liable for a defect within the limits of the highway as located by law but outside the part of the road used and open for public travel.

TORT for personal injuries alleged to have been caused by a defect in Bennington Street, a public highway in Boston. Writ in the Municipal Court of the City of Boston dated October 18, 1901.

On appeal to the Superior Court the case was tried before *Pierce*, J., who at the close of the plaintiff's evidence ordered a verdict for the defendant. The plaintiff alleged exceptions.

W. A. Buie, for the plaintiff.

P. Nichols, for the defendant.

KNOWLTON, C. J. This is an action to recover for an injury received by falling over an alleged defect within the limits of a public street. The evidence tends to show that the street was well constructed, with a broad paved sidewalk in good condition, opposite to the place where the accident occurred. There had been an order for widening the street to make a boulevard, and houses had been moved back a considerable distance, and the city had done a part of the work of grading and putting the

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land in condition in the widened portion between the houses and the sidewalk. But the surface was left rough, with a few large stones upon it, and there was no evidence that the work had been completed, or that this widened portion had been fitted for public travel. The only portion of the street which was then designed to be used by persons passing along the street was the portion wrought for vehicles, and the adjacent sidewalks.

The plaintiff lived in one of the houses that had been moved back, and she passed over this land to reach the sidewalk, with a view to travel along the street, when her foot struck a board which stood a little above the surface, between the sidewalk and the widened portion. The question is whether this can be found to be a defect for which the city was liable. In *Kellogg* v. *Northampton*, 4 Gray, 65, 69, Mr. Justice Bigelow said that the jury should have been instructed that the town "would not be liable for obstructions or defects in portions of the highway not a part of the travelled path, and not so connected with it that they would affect the safety or convenience of those travelling on the highway and using the travelled path; and that the town would not be legally liable where an injury was sustained by a party using the road for the purpose of passing to or from his private way or path, or his own land, although it was caused by a defect within the limits of the highway as located by law, but outside the part of the road used for public travel." This statement of the law is applicable to the present case and decisive of it. It is a doctrine which has often been stated and applied. *Shepardson* v. *Colerain*, 13 Met. 55. *Smith* v. *Wendell*, 7 Cush. 498. *Paine* v. *Brockton*, 138 Mass. 564. *Harwood* v. *Oakham*, 152 Mass. 421, 427. *Felch* v. *West Brookfield*, 184 Mass. 309.*

The case of *Hickey* v. *Waltham*, 159 Mass. 460, was decided upon peculiar facts, which were held to show an obstruction so created and maintained as to constitute an unlawful interference with the plaintiff's right of access to the street. It does not change the rule stated in the cases above cited.

Exceptions overruled.

* In *Stanford* v. *Hyde Park*, 185 Mass. 253, the stake although outside of the wrought roadway must have been found to be within the portion of the highway used for public travel on foot by persons passing to and from the electric cars.

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ANNIE McLAUGHLIN *vs.* WEST END STREET RAILWAY COMPANY.

Suffolk. November 16, 1903. — June 22, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Practice, Civil, Amendment. *Limitations, Statute of.*

Under R. L. c. 173, § 48, a plaintiff in an action of tort for personal injuries incurred while a passenger on a car of a street railway company, the property of which soon after was leased to and operated by another company, who has brought his action against the operating company, may be allowed to amend his writ and declaration by substituting the leasing company as defendant.

It is no ground for refusing to allow an amendment to a writ and declaration at law by substituting one sole defendant for another, that if the amendment is not allowed the action against the defendant to be substituted will be barred by the statute of limitations, and this may be an additional reason for allowing such an amendment where the original action was brought seasonably for the same cause.

KNOWLTON, C. J. The plaintiff was injured while a passenger on a car of the West End Street Railway Company, and brought a suit to recover for the injury. In the meantime a lease had been made to the Boston Elevated Railway Company, which latter corporation assumed all obligations and liabilities of the former corporation and began to operate the road, and the suit was brought against this latter corporation. The plaintiff was allowed to amend her writ by substituting the West End Street Railway Company for the Boston Elevated Railway Company as defendant, and the question submitted on the report is whether the order allowing the amendment was within the authority of the court.

The cause of action for which the suit was brought was the injury, and the plaintiff intended to bring it against the party liable for the injury. Our statute is very liberal in allowing any amendment "in matter of form or substance . . . which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought." R. L. c. 173, § 48. "The allowance by the court of an amendment shall be conclusive evidence of the identity of the cause of action." R. L. c. 173, § 121. *Batchelder* v. *Pierce*, 170 Mass. 260, and cases cited.

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Driscoll v. *Holt*, 170 Mass. 262. An amendment may substitute one party for another. *Winch* v. *Hosmer*, 122 Mass. 438. *Hutchinson* v. *Tucker*, 124 Mass. 240. *Lewis* v. *Austin*, 144 Mass. 383. The defendant contends that this rule should not go so far as to permit the substitution of one sole defendant for another sole defendant. But this objection is covered by the decision in *Adams* v. *Weeks*, 174 Mass. 45, in which an amendment of this kind was held to have been rightly allowed. We see no good reason why the rule should not be the same in reference to a change of the party defendant as to a change of the party plaintiff.

The defendant contends that such an amendment cannot be allowed, if, at the time of proposing it, the action would have been barred by the statute of limitations if no suit had been brought. But the fact that a claim would be lost if an amendment was not allowed has often been considered an additional reason for allowing one, if in other respects the case was within the rule permitting amendments. *George* v. *Reed*, 101 Mass. 378. *Sanger* v. *Newton*, 134 Mass. 308. *Hutchinson* v. *Tucker*, 124 Mass. 240. *Cogswell* v. *Hall*, 185 Mass. 455. The new party, brought in as a defendant, is precluded from contending that the statute of limitations is a bar, by the fact that a suit was seasonably brought upon the cause of action. By the bringing of the suit, the rights of the plaintiff were saved, and when the former proceeding is corrected by an amendment, it is as if the proceeding had been perfect in the beginning.

This case is not like *Smith* v. *Butler*, 176 Mass. 38, in which the cause of action against the new parties brought into the suit in equity was not included in the original suit at all, but only such cause of action as existed against the original parties.

Case to stand for trial.

J. E. Young, for the plaintiff.

W. B. Farr, for the defendant.

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PADDOCK AND FOWLER COMPANY *vs.* MARY C. SIMMONS.

Middlesex. November 17, 1903. — June 22, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Bills and Notes. Payment. Subrogation. Waiver.

In this Commonwealth the presumption, that a negotiable promissory note is payment of the debt for which it is taken, is a presumption of fact which may be rebutted by evidence showing that such was not the intention of the parties, and where it appears that treating the note as payment would deprive the party taking it of a security which he holds for the payment of the debt, this is strong evidence that the note was not accepted in payment.

In an action against a married woman upon a guaranty in writing to make good any loss incurred by the plaintiff in guaranteeing advances made by bankers to the defendant's husband in connection with the importation of goods by him, if it appears that there was an arrangement between the plaintiff, the defendant's husband and the bankers, by which the bankers were entitled to a lien on the bills of lading and the goods imported to secure their advances, if also it appears that the plaintiff in a course of business known to the defendant and acquiesced in by her delivered the bills of lading to the defendant's husband or sold the goods and credited the defendant's husband with the proceeds less commissions, the defendant can be found to have waived any right of subrogation she otherwise might have had to any lien of the bankers upon the bills of lading or the goods or their proceeds, and any right she might have had to treat the release of such lien by the acts of the plaintiff as payment *pro tanto* on her guaranty to him.

CONTRACT on certain guaranties in writing described in the first paragraph of the opinion. Writ dated September 10, 1901.

In the Superior Court the case was tried before *Fox*, J., without a jury. The defendant requested the following rulings: "1. On all the evidence the plaintiff is not entitled to recover. 2. The demand note for $907.75 given by Simmons and Company to the plaintiff, dated May 1, 1899, was payment *pro tanto* and discharged the defendant to that amount. 3. The delivery of the merchandise or bills of lading representing it by the plaintiff to Hiram Simmons [the defendant's husband], exonerated the defendant from all liability on her several guaranties."

The judge refused to rule as requested, and found for the plaintiff in the sum of $6,330. The defendant alleged exceptions.

L. Sullivan, for the defendant, submitted a brief.

J. W. Allen, for the plaintiff.

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MORTON, J. This is an action of contract upon three written guaranties given by the defendant to the plaintiff to insure it against loss on guaranties given in turn by it to certain banking houses on letters of credit issued by them for the benefit of the defendant's husband. There was a loss upon each of the guaranties given by the plaintiff which it was compelled to make, and has made, good, payment of which was duly demanded of the defendant and her husband. The case was tried by the judge without a jury, and the judge found for the plaintiff for the full amount claimed. The case is here on exceptions by the defendant to the refusal of the judge to give certain rulings that were requested. The first ruling requested was that on all the evidence the plaintiff was not entitled to recover. This has not been argued and we, therefore, treat it as waived. The refusal to give it was clearly right.

For the loss on the first guaranty the defendant's husband gave the plaintiff a note payable on demand which was indorsed by the defendant and was protested shortly before this action was brought, and has never been paid in whole or in part. The second request was in substance that this note operated as a payment *pro tanto*, and discharged the defendant to that amount. This was refused and we think rightly. The presumption, which prevails in this State, that a negotiable promissory note is payment of the debt for which it is taken, is not a conclusive presumption, but is a presumption of fact and may be rebutted by evidence showing that such was not the intention. The fact that the result of giving effect to the presumption will be to deprive a party, in a given case, of security which he has for the payment of his debt, will go a long way towards rebutting the presumption. *Brewer Lumber Co.* v. *Boston & Albany Railroad*, 179 Mass. 228. In the present case the judge could find, as he must have found, that it was not intended that the note should operate as payment.

The defendant's husband was engaged in the business of importing and selling foreign fruits, and had been so engaged for many years. Sometimes the goods came to New York and sometimes to Boston. When they came to New York the plaintiff sold them for him and subject to his order and he was credited by the plaintiff with the proceeds less its commissions for making

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the sales. When the goods came to Boston the bills of lading were sent to him by the plaintiff, and he sold the goods himself, and collected the proceeds. This course of business was known to or could have been found by the presiding judge to have been known to the defendant, though it was agreed that she was not acquainted with the details of her husband's business. It would seem from the bill of exceptions that there was an arrangement between the plaintiff and the defendant's husband, and the bankers issuing the letters of credit, by which the latter were entitled to a lien on the bills of lading and the goods represented by them to secure them for their advances, though it is not clear whether, if there was any such lien, it was confined to the first letter of credit only, or applied to the other letters of credit also. We assume in favor of the defendant that it applied to all the letters of credit. And the third and last ruling requested by the defendant was that the delivery of the merchandise or the bills of lading representing it by the plaintiff to the husband released the defendant from liability on her guaranties. This request was also refused and as we think rightly. Assuming that, in the absence of anything modifying or affecting her rights, the defendant would have been entitled, upon payment of any sums guaranteed by her, to be subrogated to any security held by the bankers issuing the letters of credit and the plaintiff, and that a release or discharge of such security by the plaintiff would have operated *pro tanto* as payment of any sums due the plaintiff from the defendant, nevertheless it was competent for the judge to find, and for aught that appears he did find, that she was content that the business should be conducted by the plaintiff and her husband in the manner in which it had been and was conducted, and thereby waived any lien that she otherwise might have been entitled to by way of subrogation upon the bills of lading and the merchandise represented by them, and the proceeds thereof. This view renders it unnecessary to consider whether the bankers who issued the letters of credit and the plaintiff had in fact any right or lien in or upon the bills of lading and the proceeds thereof as collateral security and what the effect of surrendering the security to the defendant's husband would otherwise have been upon the plaintiff's right to recover of the defendant upon her guaranties.

Exceptions overruled.

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WILLIAM McKINNON *vs.* RITER-CONLEY MANUFACTURING COMPANY.

Middlesex. November 19, 1903. — June 22, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Negligence, Employer's liability.

If a workman is set at work picking up rivets from the ground between two circular concentric iron shells of a gasometer in process of construction while men are at work on stagings above him riveting in place the iron plates that are to form the shells, and if this workman goes to a superintendent, tells him that the work is dangerous and that he does not care to get injured, and asks him if he will not let him do the work at night or on Sunday, and the superintendent says that that cannot be as he wants the rivets to use immediately and says "You go back to work and I will take care of you", and if the workman going back to work in the course of a few minutes is struck on the head by a falling object and injured, the superintendent in the meantime having given no directions and done nothing for the workman's protection, the workman, in an action against his employer constructing the gasometer, has a right to go to the jury on the questions of his due care, his assumption of the risk and the negligence of the superintendent.

TORT for personal injuries incurred while in the defendant's employ through the alleged negligence of the defendant's superintendent. Writ dated June 14, 1902.

In the Superior Court the case was tried before *Hardy*, J., who refused to order a verdict for the defendant and submitted the case to the jury in the manner stated in the opinion. The jury returned a verdict for the plaintiff in the sum of $400; and the defendant alleged exceptions.

W. L. Harris, for the defendant.

J. J. Hogan, for the plaintiff.

BARKER, J. The defendant in building a gasometer was constructing four shells of iron plates each shell being built up by so riveting plates together as to make a circular shell about twenty-five feet high. The circumference of the largest shell was about five hundred feet. The other shells were within this outer one and each was so much smaller in diameter than the next outer one as to leave a space between them of about two feet. Each of the three inner shells had near its outer foot a

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cup shaped projection the outer circumference of which came within two or three inches of the next outer shell.

The work was being done in the open and a person placed on the ground between any two of the shells could look upward to the sky, but in the space between the shells were stagings consisting of single planks eight or ten inches wide held up by brackets, and upon which gangs of men were riveting in building up the shells. Besides the gangs of riveters there also was a staging gang who when the progress of the work required raised the stagings to a higher level.

The plaintiff had been set to work in the spaces between the shells gathering rivets which had fallen there during the progress of the work. A rivet having fallen near him he left his work and went to the defendant's superintendent and had a talk with him about the danger of the work. What was said between them was in dispute. The plaintiff testified that he told the superintendent that the work was dangerous, that he did not care to get injured and asked if the superintendent would not let him do the work nights or on Sunday; that the superintendent said that could not be as he wanted the rivets to use immediately, and further said, "You go back to work and I will take care of you." The superintendent testified that he told the plaintiff that the work was not dangerous if he took care not to go underneath any part when men were working above, and called his attention to the amount of room he had, about five hundred feet, without being compelled to get in under where the men were working, and said that he must look out for himself and keep away from where work was going on above.

After the talk with the superintendent the plaintiff went back to his work, and in the course of a few minutes was struck by something falling upon his head from above, inflicting the injury for which he sued. There was evidence tending to show that the superintendent after the talk with the plaintiff gave no directions and did nothing looking to the plaintiff's protection.

The case was submitted to the jury upon a single count, which alleged negligence of the superintendent, a complaint on the part of the plaintiff to him of the danger, and an assurance on the part of the superintendent that he would take precautions for the safety of the plaintiff.

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The defendant's exceptions are to a refusal to direct a verdict for the defendant, and to the refusal to give two other requests particularly directed to the aspects of the case as affected by the talk between the plaintiff and the superintendent, and an exception to a portion of the charge relating to the same conversation.

1. In support of the exception to the refusal to order a verdict for the defendant it is contended that the danger was obvious and that the evidence will not justify a finding of due care on the part of the plaintiff, and that upon the evidence he must be deemed to have accepted the risk of such an injury as befell. This contention would be sound but for the evidence which tended to show that the plaintiff after complaining to the superintendent of the danger and asking to be allowed to do the work at a time when the danger would not exist had been told by the superintendent, "You go back to work and I will take care of you." If he was so told the questions of his own due care and of his assumption of the risk were for the jury. His work required him to look down and to give close attention to finding the dropped rivets in the narrow space to which light came only from above and at a height of twenty or more feet and more or less intercepted by the stagings, and he had a right to rely to some extent on the promise made to him by the superintendent. If the promise was one of present care for the plaintiff's safety it was capable of immediate fulfilment, requiring only the giving of an order to stop work above the place where the plaintiff might be. If it was made as the plaintiff testified, and if the superintendent did nothing in performance of his promise, the question whether the plaintiff was hurt by an occurrence the risk of which he had not assumed, and without contributory negligence on his own part, and solely by negligence of the superintendent in failing to take any steps to secure the plaintiff's safety, was for the jury.

2. In the portion of the charge excepted to the presiding judge after stating the substance of the interview between the superintendent and the plaintiff as testified to by the latter instructed the jury that it was for them to say first whether there was such an agreement made by the superintendent, and then that if they were satisfied "that there was such an assumption

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of duty on the part of the superintendent acting within the scope of his duty, and he failed to do it, and the plaintiff was in the exercise of due care, and by reason of such failure . . . was injured, then the plaintiff would have a right to maintain his action under the third count."

Under our decisions there was no error in the instruction. See *Davis* v. *New York, New Haven, & Hartford Railroad*, 159 Mass. 532, 535; *Burgess* v. *Davis Sulphur Ore Co.* 165 Mass. 71; *Scullane* v. *Kellogg*, 169 Mass. 544; *Cavagnaro* v. *Clark*, 171 Mass. 359.

3. The second request was to the effect that if upon the plaintiff's complaint of danger the superintendent replied that there was no danger the plaintiff still assumed the risk, and was in substance given in that portion of the charge which said that "in the absence of any agreement by the superintendent . . . the plaintiff in this case, assumed the risk of that employment, if he knew that articles were liable to fall, either by accident or by negligence of his fellow servants."

4. The third request also was substantially covered by the instructions given and just quoted, in connection with the next clause of the charge which called explicitly the attention of the jury to the defendant's contention as to the interview between its superintendent and the plaintiff.

Exceptions overruled.

SAMUEL H. SULLIVAN *vs.* PHILIP J. NEARY.

Suffolk. November 20, 1903. — June 22, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Mortgage, Of real estate. *Bills and Notes.*

If the holder of a note, secured by a second mortgage on land, purchases the land at a foreclosure sale under the first mortgage and the mortgagor releases the land to him as purchaser, and thereupon he makes a new first mortgage to the original first mortgagee, and if the proceeds of the foreclosure sale after paying the first mortgage and other charges when applied toward the payment of the note which was secured by the second mortgage leave a balance still due, the holder may recover this balance in an action on the note, as the extinguishment of the second mortgage has not extinguished the debt.

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CONTRACT for the balance due on a promissory note, dated October 1, 1901, originally for $1,050 and interest. Writ in the Municipal Court of the City of Boston dated April 2, 1902.

On appeal to the Superior Court the case was tried before *Gaskill*, J., without a jury. He refused to rule that the plaintiff could not maintain his action, and found and ordered judgment for the plaintiff in the sum of $693.81. The defendant alleged exceptions.

J. G. Holt, for the defendant.

J. R. Murphy & J. J. Moore, for the plaintiff.

BARKER, J. The principal facts are these: The defendant owning land mortgaged it for $6,000, the mortgage containing a power of sale. Subsequently he borrowed of the plaintiff $1,050, giving him on October 1, 1901, the note for that sum set out in the declaration, payable $50 in three months and the balance in six months from October 1, 1901, namely on April 1, 1902. To secure this note the defendant gave the plaintiff a second mortgage on the land. Breach was made of the conditions of the first mortgage, and a foreclosure sale under the power contained in that mortgage was made on March 8, 1902, to the plaintiff for the sum of $7,000 which the plaintiff paid to the holder of the first mortgage, who retained from that sum $6,396.42 for principal, interest and expenses of the foreclosure sale and the further sum of $126.91 for overdue taxes and turned over the balance of $476.67 to the plaintiff as holder of the second mortgage, who applied that sum in part payment of the note of October 1, 1901.

In order to raise the $7,000 the plaintiff was obliged to apply for a loan upon the land to the original mortgagee, who required a release from the defendant. The mortgagee's sale having taken place on March 8, on March 17 the defendant executed a release of the land to the plaintiff, and on March 18 the land was deeded by the original mortgagee in pursuance of the sale of March 8 to the plaintiff and mortgaged back by the plaintiff to the original mortgagee.

When the note of October 1, 1902, became due the defendant refused to pay it and this action is to recover the balance due upon it after applying upon it a first payment of $50 and the $476.67 of surplus coming from the mortgage sale.

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The case was heard by the judge without a jury and is here upon the defendant's exceptions. At the trial the facts above recited appeared in evidence or were admitted with the further facts that the plaintiff never intended to waive the payment of the balance of the note of October 1, 1901, that the original mortgage contained a covenant on the part of the defendant that upon request he should execute and deliver to the purchaser at any foreclosure sale a deed or deeds of release confirming the sale, that the release given was asked for by the original mortgagee, that the plaintiff never did or said anything in relation to the payment of the balance of the note except to say to the defendant that the plaintiff would reconvey the property if the defendant would pay the plaintiff what the property had cost him, to demand payment when the note matured and upon refusal to bring this suit.

The defendant asked the judge to rule that the plaintiff could not maintain the action. His exception is to the refusal so to rule and to the finding in favor of the plaintiff and the order of judgment on the finding.

In support of his exception the defendant contends that the release from himself to the plaintiff of March 17, 1902, worked a merger of the equity and of the plaintiff's second mortgage and extinguished the debt for which the note of October 1, 1901, was given, and in support of this contention he cites *Dickason* v. *Williams*, 129 Mass. 182, and the reference there given to 2 Washb. Real Prop. (4th ed.) 193, and cases cited.

The defendant confounds the extinguishment of the second mortgage by the release with the extinguishment of the debt secured by that mortgage. No doubt after the acceptance by the plaintiff of a deed under the foreclosure sale, the giving of the release and the giving of a new mortgage by the plaintiff to the original mortgagee the mortgage of October 1, 1901, was extinguished, even if it was not extinguished for any reason by the foreclosure itself. But the extinguishment of the debt secured by the mortgage of October 1, 1901, does not follow as a necessary consequence. In *Dickason* v. *Williams* the debt was extinguished because paid in effect by a party bound to pay it and to a party entitled to receive it. In the present instance there was no payment of the debt of October 1, 1901, except to the

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amount of the surplus realized upon the sale of March 8, 1902. The balance of the debt could be collected by suit under the ordinary rule stated in *Draper* v. *Mann*, 117 Mass. 439, 441. See *Real Estate & Building Co.* v. *Tufts*, 127 Mass. 391, 393; *Worcester Mechanics' Savings Bank* v. *Thayer*, 136 Mass. 459, 463.

Exceptions overruled.

LUTHER S. LORD & another *vs.* HINGHAM NATIONAL BANK.

Suffolk. January 5, 1904. — June 22, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Agency. Bills and Notes. Bank. Damages.

If one, to collect a debt, makes a draft on his debtor payable to the order of a certain bank, and delivers it to that bank for collection, and the bank sends it for collection to another bank which fails to use due diligence in its collection, the first named bank is the agent of the maker of the draft and the maker as principal can maintain an action against the last named bank for any loss he has suffered through its negligence.

If a bank receives a draft for collection in a letter of instructions saying "Return at once all items unpaid at maturity. They must not be held for the convenience of parties," and accompanied also by a slip requesting that the draft should not be protested, unless a custom of all banks to retain no protest items even when accompanied by such instructions is proved, it may be found that a failure to return the draft at once when not paid at maturity and holding it for the convenience of the drawee show negligence on the part of the bank, making it liable to the owner of the draft for the damages caused by the failure to return the draft promptly.

In an action against a bank for a failure to return at once on non-payment at maturity a draft which had been sent to it for collection with instructions to do this, if it appears that when the draft matured the acceptor had property open to attachment to an amount much larger than the amount of the draft and did not intend to fail or make an assignment, and that the bank held the draft uncollected for nearly a month when the acceptor failed and made an assignment, the loss of the balance of the amount of the note over the dividend received from the estate of the debtor can be found to be a natural consequence of the failure of the defendant to return the draft promptly and not too remote to be recovered as damages.

CONTRACT OR TORT for damages alleged to have been sustained by the plaintiffs by reason of the defendant's failure to return seasonably a draft which had been sent to it for collection. Writ dated December 21, 1900.

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In the Superior Court the case was tried before *Bishop*, J., without a jury. The draft was upon one West who owed the plaintiffs for a car load of hay. It was as follows:

"Hingham National Bank.

"No. 15948.

"Car No. 72292 Boston, August 10, 1900.

"Sixty days after date pay to the order of Second National Bank of Boston $139.09/100 One hundred thirty-nine 09/100 Dollars

"Value received and charge the same to account x x

"To H. R. West
No. k 53 Hingham
National
Hingham, Mass.
} Lord & Webster." [I. R. S.] [4 C.]

Upon it was indorsed the following acceptance hereafter mentioned:

"August 18, 1900.

"Accepted.

"Payable to Hingham National Bank,

"Hingham, Mass.

"H. R. West."

The plaintiffs left this draft with the Second National Bank of Boston for collection, and it was transmitted by the Second National Bank to its correspondent the Hingham National Bank, accompanied by a printed letter, of which the following is a copy, the name, the number of the item and the amount being the only portions in writing:

"The Second National Bank, of Boston, Mass. Boston, 8/17, 1900. Cashier of Hingham National Bank, Hingham, Mass.

"I beg to hand to you herewith, for favor of collection, for our account, the items listed below. Please acknowledge their receipt.

"Return at once all items unpaid at maturity. They must not be held for the convenience of parties.

"Please note any special instructions that may be entered, and advise separately the payment of each item by number.

"Unless specially directed not to do so, protest all paper which is not paid at maturity. Respectfully yours,

"T. Harlan Breed, Cashier.

"1091, Oct. 9 note. $139.09."

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The draft also was accompanied by a slip specially requesting that it should not be protested. The draft was received by the Hingham National Bank on August 17, 1900, and notice of the draft was sent to West, who accepted it on August 18.

There was further testimony on behalf of the plaintiffs that the draft was not returned by the defendant and that no information was received from the defendant about the draft until November 6, when it was returned by the defendant to the Second National Bank unpaid, and was by the Second National Bank returned to the plaintiffs; that subsequently on November 8 or 9, the plaintiffs received notice that West had made an assignment.

The evidence in regard to West's pecuniary condition and the consequence of the defendant keeping the draft until West had become insolvent is described in the opinion.

At the close of the evidence the defendant requested the judge to make the following rulings:

"1. No legal relation existed between the plaintiffs and the defendant, and the plaintiffs are not entitled to recover.

"2. No legal relation existed between the plaintiffs and the defendant which imposed any duty upon the defendant toward the plaintiffs, and the plaintiffs are not entitled to recover.

"3. The damages alleged to have been suffered by the plaintiffs by the defendant's failure to return the draft are remote, and the plaintiffs are not entitled to recover.

"4. The plaintiffs were not the legal owners of the draft in question, and therefore cannot maintain suit against the defendant for failure to collect the draft, or to return the same if uncollected.

"5. On all the evidence in the case the plaintiffs are not entitled to recover."

The judge refused to rule as requested, and found for the plaintiffs in the sum of $123.51, the amount of the draft less twenty per cent which was payable to the plaintiffs from the assignee of West. The defendant alleged exceptions.

T. H. Buttimer, for the defendant.

J. F. Wiggin & J. Wiggin, for the plaintiffs.

BARKER, J. 1. The defendant concedes that in case of drafts or other negotiable paper intrusted to a bank for collection,

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where from the necessity of the case some other agent must be employed the collecting bank is agent of the owner of the paper. See *Fabens* v. *Mercantile Bank*, 23 Pick. 330; *Phipps* v. *Millbury Bank*, 8 Met. 79, 82. Its first contention is that the plaintiffs had no legal title to the draft either as drawn or by any indorsement, and that because they could not sue on the draft they have no action against any party to whom it was transmitted for collection.

But in the present case the Second National Bank of Boston in whose favor the draft was drawn was content to receive the draft and to attempt its collection for the benefit of the plaintiffs and so became their agent in the matter. This distinguishes the case from *Allen* v. *Ayres*, 3 Pick. 298, and other cases cited for the defendant. There was the same privity between the plaintiffs and the defendant which is found wherever a contract turns out to have been made by one of the contracting parties as an agent for an undisclosed principal.

2. While the draft was accompanied by a slip specially requesting that it should not be protested, the letter of instructions also said "Return at once all items unpaid at maturity. They must not be held for the convenience of parties." The non-protest slip was not inconsistent with and did not waive these instructions. While the evidence tended to show that it was the practice of some banks to retain no protest items even where accompanied by instructions like those quoted it also showed that it was not the practice of all banks, and the presiding judge found that the evidence offered did not prove a custom. This made it competent for him to find that a failure to return the draft at once when it was not paid at maturity was negligence on the part of the defendant in dealing with the draft. The evidence abundantly justified a finding that the defendant both failed to return the draft as directed and held it for the convenience of the drawee in direct violation of instructions.

3. It cannot be said as matter of law that the plaintiffs' damages are remote. The drawee had property open to attachment to an amount much larger than the amount of the draft. The holding of the draft for nearly a month after maturity until he failed and made an assignment had as a natural consequence the entailment of a loss, which there is good reason to believe would

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not have been incurred if the defendant had at once returned the draft as instructed to do when it was not paid at maturity. The keeping of it by the defendant had for its natural consequence the deprivation of the plaintiffs of all opportunity to collect it by an action against a debtor who had unincumbered property in his possession open to attachment and who did not intend to fail or make an assignment.

Exceptions overruled.

PATRICK H. KELLEY *vs.* CITY OF BOSTON.

Suffolk. January 12, 13, 1904. — June 22, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Municipal Corporations.

A city is not liable for an injury caused by snow and ice negligently thrown from the roof of its city hall by men employed by its superintendent of public buildings, if the whole building is used and occupied for municipal purposes, although portions of the building are used by the water, sewer and other departments.

TORT for injuries to an awning, extending from the plaintiff's premises on City Hall Avenue in Boston, alleged to have been caused by snow and ice negligently thrown from the roof of the city hall of that city. Writ in the Municipal Court of the City of Boston dated March 14, 1902.

On appeal to the Superior Court the case was tried before *Richardson*, J., who upon an agreed statement of facts ordered judgment for the plaintiff in the sum of $45; and the defendant appealed.

By the agreed facts it appeared that the men who threw the snow and ice from the roof of the city hall were employed by the superintendent of public buildings, who was appointed by the mayor under St. 1895, c. 449, § 22, and who by the Revised Ordinances of Boston of 1898, c. 32, was given supervision of the condition of public buildings belonging to the city. The manner in which the building was used and occupied by the city is stated in the opinion.

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The case was argued at the bar in January, 1904, before *Knowlton*, C. J., *Lathrop*, *Barker*, *Hammond*, & *Braley*, JJ., and afterwards was submitted on briefs to all the justices.

P. Nichols, for the defendant.

P. H. Kelley, *pro se*.

LATHROP, J. It is familiar law that if the city hall was used exclusively for the performance of duties imposed upon the defendant by statute, this would exempt the city from liability for the negligence of those to whom the care and custody of the building was intrusted; and the plaintiff seeks to hold the defendant liable principally upon the ground that a portion of the building was occupied by the water department, the city collector, and the superintendent of streets who has charge of several divisions, including the ferry division and the sewer division. The agreed facts state that the city hall was erected under authority of the General Statutes and belongs to the defendant; that it is used for the meetings of the city council and for offices of the various municipal departments. The agreed facts further state that none of the above named departments, meaning the water department and those mentioned in connection therewith, pay any rent for the use of their rooms in the city hall.

The argument for the plaintiff is that because of this occupation by several departments which collect money for the city the defendant is liable as any private person. But no case has gone to this extent. All of the departments mentioned are strictly municipal departments of the city, and must be housed by the city. The only cases in which a city has been held liable on account of the occupation of a city hall is where it lets a substantial portion of it for hire and a person invited to an entertainment therein is injured by a defect. *Oliver* v. *Worcester*, 102 Mass. 489. *Worden* v. *New Bedford*, 131 Mass. 23. *Little* v. *Holyoke*, 177 Mass. 114. This is not so in the case before us.

It is not a correct proposition of law that because a city derives some incidental gain and advantage from the use of a public building, the city is therefore responsible. Thus in *Curran* v. *Boston*, 151 Mass. 505, it was held that the defendant was not liable for personal injuries occasioned to an inmate of

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its house of industry, by the negligence of the officers and servants employed by the board of public institutions to administer its affairs, although at the time such inmate was engaged in labor from which the city derived a profit. And in *McCann* v. *Waltham*, 163 Mass. 344, the defendant was held not to be liable for the negligence of its superintendent of streets, though the city derived some benefit. See also *Taggart* v. *Fall River*, 170 Mass. 325; *Mahoney* v. *Boston*, 171 Mass. 427; *Murphy* v. *Needham*, 176 Mass. 422.

It is true that a city has been held liable for the negligent acts of an employee of the water department, whereby a person who has a contract with the city to supply water to him is injured, but this is because of the contract to supply water and for no other reason. *Stock* v. *Boston*, 149 Mass. 410. *Merrimack River Savings Bank* v. *Lowell*, 152 Mass. 556, 560. It by no means follows that because the city hall is in part occupied by the water department, the city is liable in this case. The same remarks apply to the sewer department, and the other departments mentioned.

It is not contended that the city hall is not a municipal building because it was built under a statute which allowed the city to build it, rather than under a compulsory statute. Nor could it be so contended since the case of *Tindley* v. *Salem*, 137 Mass. 171. See also *Fisher* v. *Boston*, 104 Mass. 87; *Benton* v. *Boston City Hospital*, 140 Mass. 13; *McCann* v. *Waltham*, 163 Mass. 344; *Taggart* v. *Fall River*, 170 Mass. 325; *Murphy* v. *Needham*, 176 Mass. 422.

Judgment for the defendant.

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ANNIE S. BAXTER *vs.* ANDREW F. GORMLEY.

Middlesex. January 13, 1904. — June 22, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Bastardy. Evidence.

On the trial of a complaint under the bastardy act, the complainant can be asked by her counsel whether the defendant is the father of her child and can answer that he is, this being admissible as an accusation of paternity competent under R. L. c. 82, § 16, to prove constancy in that accusation on the part of the complainant.

BARKER, J. At the trial of this complaint under the statutes relating to bastardy the complainant was allowed to answer in the affirmative a question put by her counsel whether the defendant was the father of the child. The question was in these words, "Is he the father of this child?" The objection to the question was not because it was leading but because it was incompetent. The defendant now contends that the question was incompetent because a witness can testify to the facts which go to prove a conclusion but not to the conclusion itself, citing *Robbins* v. *Atkins*, 168 Mass. 45, and *O'Donnell* v. *Pollock*, 170 Mass. 441, and further contending that the affirmative answer was not evidence of an accusation under R. L. c. 82, § 16.

In *Robbins* v. *Atkins* the question excluded was a question of law as to the defendant's legal authority. In *O'Donnell* v. *Pollock*, the questions excluded involved more matter of opinion and judgment than of fact. The question admitted in the case at bar does not fall very closely within either of these classes. However this may be the question and answer constituted when the answer was given an accusation of paternity, which under R. L. c. 82, § 16, was competent to prove constancy in such accusation on the part of the complainant, and the bill of exceptions does not show that it was not admitted for that purpose. See *Burns* v. *Donoghue*, 185 Mass. 71.

Exceptions overruled.

J. P. Feeney, for the defendant.

H. N. Allin, for the plaintiff.

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SOLOMON F. CUSHMAN & others *vs.* FREDERICK E. SNOW, trustee.

Hampden. March 8, 1904. — June 22, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Factor. Payment.

In an action by a manufacturer against the assignee for the benefit of the creditors of a factor who had become insolvent, to recover a balance alleged to be due for amounts received by the factor in payment for the plaintiff's goods consigned to him for sale, it appeared, that by the course of dealing between the plaintiff and the factor the factor sold the plaintiff's goods, consigned to him, for cash or on credit to such customers as he pleased without disclosing the name of his principal, and credited the plaintiff with the amount of the purchase money whether it then had been received or not, guaranteeing the sales and receiving a commission for doing so, that when the factor made remittances to the plaintiff from time to time they were credited generally without reference to any particular consignment, that with quarterly statements and adjustments of interest the account ran on continuously from month to month and year to year; and that during the entire period up to the time of the factor's insolvency the factor was indebted largely to the plaintiff on the whole account as would have appeared if a balance of the whole account had been struck at any time. The defendant contended that he was entitled to retain the balance claimed by the plaintiff because it represented a sum which the factor had paid to the plaintiff in excess of the amount which the factor's books showed to be due to the plaintiff at a certain date, and the defendant claimed the right to retain the proceeds of the sales made during a period of about three weeks and a half from that date, on the ground that the payments made by the factor to the plaintiff should be appropriated to the sales made by the factor in the order in which they were made, and that this would leave the balance in question as the property of the factor, so that the plaintiff could claim the amount only as a general creditor of the factor. *Held*, that the payments by the factor should be applied on the open running account in accordance with the course of dealing between the parties, and as the balance on the general account was at all times against the factor the money retained by the defendant belonged to the plaintiff.

CONTRACT against the trustee for the benefit of the creditors of the firm of Sawyer, Manning and Company for money had and received, with a bill of particulars alleging a certain balance to be due to the plaintiffs on account of goods sold by Sawyer, Manning and Company as agents for the plaintiffs. Writ dated September 17, 1898.

In the Superior Court the case was submitted upon an agreed statement of facts to *Gaskill*, J., without a jury. He found for

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the plaintiffs and assessed damages in the sum of $7,668.40. The defendant appealed.

The agreed facts were as follows:

The plaintiffs were woollen manufacturers, operating mills at Monson, and for a period of about four years previous to February 19, 1898, consigned the products of their mills for sale on commission to Sawyer, Manning and Company, a firm of commission merchants doing business in Boston and New York.

On February 19, 1898, Sawyer, Manning and Company, being insolvent, made an assignment to the defendant of all their firm and individual assets for the benefit of their creditors.

Sawyer, Manning and Company sold the plaintiffs' goods to such customers as they deemed advisable, guaranteeing payment in every case, for which guarantee they received a commission. It was not the practice of Sawyer, Manning and Company to give the plaintiffs the names of their customers. When Sawyer, Manning and Company sold any goods of the plaintiffs, they credited the plaintiffs on their books with the amount of such sales, whether such sales were made for cash or on credit, although, when made on credit, Sawyer, Manning and Company had not received the proceeds.

During the time Sawyer, Manning and Company were so engaged in selling the plaintiffs' goods, they from time to time made remittances to the plaintiffs on account of goods consigned to them, but all such remittances were made on account, and were so credited by the plaintiffs, without reference to any particular consignment made by the plaintiffs, or any particular sale made by Sawyer, Manning and Company, or payment received by them on account of such sale. Each remittance so made by Sawyer, Manning and Company was charged by them to the general account of the plaintiffs and credited on the general account on the plaintiffs' books. The sales made by Sawyer, Manning and Company bore no relation to the individual shipments made by the plaintiffs, and when such sales were made on credit, the length of such credit differed with different customers. On balances in the hands of Sawyer, Manning and Company, the plaintiffs were allowed interest from the average due date of sales, and Sawyer, Manning and Company charged interest on such balances as from time to time were standing in

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their favor; but as a rule, the balances remained against Sawyer, Manning and Company, and the plaintiffs were allowed interest accordingly.

During the entire period from November 30, 1897, to February 19, 1898, the balance on the entire account was uniformly against Sawyer, Manning and Company, and was so on the last named date, when the assignment to the defendant was made.

Monthly sales accounts were rendered by Sawyer, Manning and Company to the plaintiffs, and they also rendered quarterly accounts current in which interest was computed, and charged or credited as the case might be. No adjustments of interest or balances were made, but the sales accounts were carried along from month to month, each quarterly statement starting with the balance shown on the statement preceding.

After the plaintiffs had begun to do business with Sawyer, Manning and Company, they wrote them on July 29, 1895, the following letter:

"Monson, Mass., July 29, 1895. Mess. Sawyer, Manning & Co., Gentlemen: We are in receipt of your memo. of sales, and think perhaps we have heretofore neglected to state that our method of dealing with our commission houses has been to have them render sales accounts at the end of each month, but to let the account stand to our credit, subject to our sight draft, we notifying you at time of making draft, and both sides of the account reckoning interest at six per cent. Account current rendered quarterly (Jan. 1st, etc.). We do not like to have sales cashed, as we do not always have places to use it advantageously. Please let us know if the above will be satisfactory to you. Yours respectfully, S. F. Cushman & Sons."

To this, on July 30, 1895, Sawyer, Manning and Company made the following reply:

"New York, July 30, 1895. Messrs. S. F. Cushman & Sons, Monson, Mass. Gentlemen: Your favor of 29th received, and your manner of doing business is the same as we have been accustomed to, with one exception; that is, we never allow any one to make a draft on us. When you require any money, if you will kindly write to us, we will send it to you by return mail. Yours truly, Sawyer, Manning & Co."

The arrangement indicated in these letters was not thereafter

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changed, down to the time of the assignment of Sawyer, Manning and Company to the defendant.

At the time of making the assignment, the amount due the plaintiffs, according to the books of Sawyer, Manning and Company, after deducting all charges and commissions, was $11,559.09, which afterwards was reduced by payments made by the defendant to $5,792.41.

The account after November 30, 1897, was as follows:

Net amount due November 30, 1897 .	$29,617.10		
Add sales subsequent to November 30, 1897	17,341.99		
		$46,959.09	
Less payments made by Sawyer, Manning and Company subsequent to November 30, 1897 .		35,409.51	
			$11,549.58
Less payment by defendant			5,432.12
			$6,117.46
Balance of credit and debit for interest and allowances on sales subsequent to December 24, 1897			325.05
			$5,792.41

After the defendant became trustee under the assignment, he collected on account of sales of the plaintiffs' goods made by Sawyer, Manning and Company a sum of money sufficient to pay the plaintiffs' claim in full. From these collections the defendant paid to the plaintiffs all of their claim except the sum of $5,792.41 due at the date of this action, and held in his hands the sum of $5,792.41, derived from sales made between November 30 and December 24, 1897, inclusive, and collected by him, this being the amount of sales between those dates, and held no other proceeds of such collections.

The amounts collected by the defendant were on account of sales, payments for which, by the terms made by Sawyer, Manning and Company with the customers to whom such sales were made, were not payable until after the last remittance made by Sawyer, Manning and Company to the plaintiffs.

The defendant paid a dividend of forty per cent to all the creditors of Sawyer, Manning and Company, and tendered the plaintiffs the sum of $2,316.96, the dividend to which the plaintiffs were entitled, if not entitled to be paid in full.

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C. K. Cobb, for the defendant.

C. L. Gardner, *C. G. Gardner & E. S. Gardner*, for the plaintiffs.

BRALEY, J. If the relation of debtor and creditor existed between the defendant's assignors and the plaintiffs the defendant invokes the aid of the general rule relating to the appropriation of payments where this relation is shown, namely, that when money is paid, if no direction is given by the debtor the creditor may apply it as he chooses, but if no appropriation is made by either the law makes such application as justice between the parties may require. *Parker* v. *Green*, 8 Met. 137, 144. *Crompton* v. *Pratt*, 105 Mass. 255. *Worthley* v. *Emerson*, 116 Mass. 374. *National Mahaiwe Bank* v. *Peck*, 127 Mass. 298. *Swett* v. *Boyce*, 134 Mass. 381.

There was no contract in writing, but the general course of dealing between the plaintiffs and their agents seems to have been that the latter sold the goods consigned either for cash or on credit to such customers as they pleased, whose names were not disclosed to the principals, but when they were sold the plaintiffs were credited with the amount notwithstanding the proceeds of the sales on credit had not been received.

As the sales were made the agents after taking out commissions and other charges remitted the remainder, and also an account of the goods sold to the plaintiffs, and such remittances were credited generally without reference to any particular consignment, or any single sale, and beyond rendering monthly accounts of sales, and quarterly statements in which interest on the account also was adjusted between them, no final balance was struck or adjustment made in the general account, and it ran continuously from month to month and year to year.

It cannot be inferred from the meagre statement of the custom of the firm not to disclose the names of customers to their principals that they thus rendered themselves liable for the purchase price of all goods sold through their agency, for if they undertook to guarantee the sales and solvency of purchasers it should have appeared in the contract. *Swan* v. *Nesmith*, 7 Pick. 220, 223. *Upham* v. *Lefavour*, 11 Met. 174.

But if it is true that the firm can be considered *del credere* factors and became debtors as argued by the defendant, the title

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to the property did not pass to them but remained in the plaintiffs, who still retained the right to resort to the original purchasers for payment, and this rests on the ground of the right of the principals to enforce a contract made by an agent even if at the time of sale they were undisclosed to the purchaser, while any defence which the latter could have raised against the agent is open in such a suit. *Kelley* v. *Munson*, 7 Mass. 319, 323. *Barry* v. *Page*, 10 Gray, 398, 399. *Locke* v. *Lewis*, 124 Mass. 1, 7. *Foster* v. *Graham*, 166 Mass. 202. See Pub. Sts. c. 71, § 1.

In such a case moreover the guaranty does not transform the essential character of the relation, for the principal retains title to the goods until sold, and then to their proceeds at least until paid to the agent, and may pursue both agent and purchaser until he has obtained satisfaction of his debt. *Denston* v. *Perkins*, 2 Pick. 86. *Chesterfield Manuf. Co.* v. *Dehon*, 5 Pick. 7. *Merrill* v. *Bank of Norfolk*, 19 Pick. 32, 34. *Vail* v. *Durant*, 7 Allen, 408. *Rhoades* v. *Blackiston*, 106 Mass. 334. *Robinson* v. *Talbot*, 121 Mass. 513. *Titcomb* v. *Seaver*, 4 Greenl. 542, 544. *Thompson* v. *Perkins*, 3 Mason, 232. See *Roosevelt* v. *Doherty*, 129 Mass. 301, 302.

And where the factors become insolvent their agency is thereby terminated, and an assignee, and here the defendant as trustee, stands in their place and takes the estate of his assignors subject to all the equities in favor of third parties that may attach to it, with the further liability that if he collects money from purchasers who dealt with the agents as principals he must account for it to the consignors unless he can show that it is a part of the assets of the insolvent estate. *Audenried* v. *Betteley*, 8 Allen, 302, 308. *Chace* v. *Chapin*, 130 Mass. 128, 131.

For the purposes of this defence the defendant selects November 30, 1897, from a period covering nearly four years, as a date when in the books of account kept by the agents from the entries made by them of transactions with the plaintiffs, it appeared they owed $29,617.10. Subsequently, and before their failure they paid $35,409.51, and if this amount is applied in payment of the account as it stood on that date, the sum of $5,792.41 remains as money apparently advanced on goods sold but not paid for by customers from November 30, 1897, to De-

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cember 24, 1897, or a payment to this extent in excess of the actual indebtedness; and when this amount was collected by him he contends that it lawfully can be retained because the plaintiffs were required to apply the overpayment until it was exhausted on the next succeeding consignments of goods, and if they did not the law should now make such an appropriation.

But the entries on their books created no agreement between the parties, and were in the nature of private writings for the use of themselves; they never were brought to the knowledge of the plaintiffs nor assented to by them, and cannot modify the terms of the contract. *Swift* v. *Pierce*, 13 Allen, 136, 137.

Moreover, the difficulty in maintaining this position is that the general course of dealing between the parties was continuous, as all the goods were consigned and remittances made under one agreement without any reference to whether payments for sales by the agents had matured, or were still outstanding, and when payments between the parties were received they were not accepted, nor remitted in liquidation of a specific part of the business transactions between them, but in part satisfaction of an open and running account, and during the entire time in which this adjustment of payments and advances is interposed, and up to that of their failure, the factors themselves were largely indebted to the plaintiffs if a balance had been struck of the full account, including the credit of alleged overpayment. *Hill* v. *McLaughlin*, 158 Mass. 307, 309. *Sercombe-Bolte Manuf. Co.* v. *Lovell Arms Co.* 171 Mass. 175, 176. *Gass* v. *Stinson*, 3 Sumn. 98, 112.

It also is clear that such an artificial distinction was not contemplated by the parties, for the consignments of goods and remittances therefor followed in the usual way between the dates selected, and no request was made by the firm for any change in the application of payments. If the factors had brought an action against the plaintiffs to recover the amount as an advance in excess of sales they must have been defeated, for a full statement of the account taken at any time during the period covered would have shown that "the balance on the entire account was uniformly against" them. *Upham* v. *Lefavour*, 11 Met. 174.

Indeed it would seem a novel proposition for a debtor who is

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liable to his creditor for a final balance due on a general account, extending through a series of years with an intermingling of charges and payments, to select a date when by his system of bookkeeping he had made payments sufficient to show an indebtedness to him to claim they are to be applied to show a surplus to his credit, where if they are applied as received by his creditor the balance is constantly against him.

So here, to prove a balance in his favor the defendant is obliged to accumulate all the payments made after November 30, and apparently up to the date of his appointment, and apply them to produce this result; but to do this he ignores the fact that during the whole time, for aught that appears to the contrary, goods were being consigned and sold, the proceeds of which when remitted if appropriated in the usual manner could not be used for such purpose.

No sufficient reason is now shown why the application of these payments should not follow the usual course pursued by the plaintiffs and their agents; and as the latter never suggested that the money remitted was in excess of the proceeds of sales that had been received, the plaintiffs were at liberty to assume they were receiving funds which by the contract rightfully belonged to them, and when a proper credit was given in the order of their receipt it must be treated as appropriated to a partial discharge of the account, and is conclusive. *Parker* v. *Green*, 8 Met. 137, 144. *Upham* v. *Lefavour*, *ubi supra*.

Judgment affirmed.

ISAAC SPELLMAN *vs.* CATHERINE C. DYER & another.

Norfolk. March 10, 1904. — June 22, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Negligence, Contributory. *Dog.*

A junk dealer, who leaving his team in the road enters the premises of another person and picking up a rope from the ground is bitten in the calf of the leg by a watch dog, can be found not to have been in the exercise of due care although he did not intend to steal the rope.

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TORT under Pub. Sts. c. 102, § 93, (R. L. c. 102, § 146,) against Catherine C. Dyer, and Thomas Dyer her husband, for double the amount of damages sustained by the plaintiff from the bite of a dog of which the defendants were alleged to be the owners and keepers. Writ dated May 28, 1901.

At the trial in the Superior Court before *Sherman*, J., it appeared, that the plaintiff was a junk dealer living at Walpole who had two teams and carried on business by going around to see what was for sale, that on April 17, 1901, he was on Mylod Street in Norwood, and, leaving his horse standing in the road, went upon the defendant's premises, stopped and picked up a large rope that the defendant Thomas had used for tying loads of hay and for other purposes, and as he picked it up and had it in his hand was bitten in the calf of the leg by a watch dog, a large St. Bernard, belonging to the defendant Catherine.

The plaintiff asked the judge to make the following rulings:

"First. There is not evidence in this case that there was not such due care on the part of the plaintiff in this case as not to enable him to recover damages for the injuries received.

"Second. There is no evidence in this case which would warrant the jury in saying that the defendant was taking up said rope with any unlawful intent such as would preclude him from recovering damages for the injuries inflicted by the defendant's dog.

"Third. If the jury believe that the act of the plaintiff in picking up the rope was prompted by unlawful intent, or with the unlawful purpose of taking the rope, such act is not a contributing cause, but a mere condition, and the defendant is liable for the injuries done by her dog."

The judge refused to rule as requested. He ordered a verdict for the defendant Thomas, and submitted the case to the jury as against the defendant Catherine, leaving to the jury the questions quoted in the first paragraph of the opinion, upon which the jury found that the plaintiff was not in the exercise of due care at the time he was bitten by the dog, that the plaintiff was taking up the rope at the time he was bitten but had no intent to steal it, and that the plaintiff suffered damage from the bite to the amount of $150. The jury returned a general verdict for the defendant; and the plaintiff alleged exceptions.

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J. J. Feely, for the plaintiff.

J. A. Halloran, for the defendants.

MORTON, J. This is an action to recover of the defendants, who are husband and wife, damages for the bite of a dog which belonged to the wife. The judge directed a verdict for the husband, to which no exception was taken and left the case to the jury as against the wife. We shall speak of the wife as the defendant. The jury returned a verdict for the defendant, and the case is here on exceptions by the plaintiff to the refusal of the judge to give certain instructions that were requested, and to those that were given. When he was bitten the plaintiff was upon the premises occupied by the defendant and her husband, a short distance from the driveway that led from the street to the barn, and there was testimony tending to show that he was in the act of taking up a rope, which lay upon the grass, when the dog bit him. In addition to the general verdict found by them for the defendant, the jury answered three questions that were submitted to them by the judge as follows: "1. Was the plaintiff in the exercise of due care at the time he was bitten by the dog? Answer: No. 2. Was the plaintiff taking the rope and did he have the intent to steal it at the time he was bitten? Answer: 1. He was taking up the rope. 2. No intent to steal it." The remaining question related to the amount of damages.

The burden of proof was on the plaintiff to show that at the time when he was bitten he was in the exercise of due care (*Raymond* v. *Hodgson*, 161 Mass. 184), and whether he was or not was a question of fact for the jury. The first instruction requested, which was, in substance, that the evidence would not warrant a finding that he was not in the exercise of due care, was rightly refused. There was a sign on the barn "Beware of the dog", and the jury could well find, as they did, that taking all of the circumstances into account the plaintiff's conduct was not that of a prudent man. It could not be ruled as matter of law that there was no evidence that he was not in the exercise of due care. The defendant had a right to keep a watch dog to protect herself and the premises occupied by her husband and herself and the property therein from thieves, tramps and burglars. If there was an implied license to the plaintiff to enter on the premises in the usual course of his vocation, it was con-

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fined to such paths and means of entrance and exit as were provided for that purpose. It gave him no right to meddle with property, or to enter buildings, or to stray at large over the premises. He was technically at least a trespasser, as the judge told the jury, when he was taking up the rope, and it was for the jury to take that fact and all the other facts as found by them into account in passing upon the question of his due care. It did not follow that he was necessarily in the exercise of due care because he had no intention of stealing the rope when he took it up. If there was a dog there he was bound to know that if he meddled with property without the leave of the defendant or her husband or their servants that the dog might bite him and to govern himself accordingly. There is nothing to show that the dog was dangerous, and the doctrine laid down in *Marble* v. *Ross*, 124 Mass. 44, in regard to dangerous animals is not applicable. The second and third requests were rightly refused and also were rendered immaterial by the finding of the jury in answer to the second question that the plaintiff in taking up the rope had no intention to steal it. Taking the instructions as a whole we see no error and think that the jury could not have been misled by anything that was said. In concluding his charge the judge told the jury in substance that if the plaintiff "did not take the rope with the intent to steal it, and he did not do anything but what the ordinary junk dealer would properly do" they might find that he was in the exercise of due care, but if he was not acting as an ordinary junk dealer and went about the houses and into the barn to see what he could find and that he took the rope intending to steal it, as claimed by the defendant, then they might find that he was not in the exercise of due care. This was sufficiently favorable to the plaintiff.

Exceptions overruled.

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JOSHUA THISSELL & another, executors, *vs.* CHARLES SCHILLINGER & others.

Worcester. May 18, 1904. — June 22, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Devise and Legacy, Construction.

A will contained the following provisions: "I give and bequeath all the rest and residue of my personal property to my brother C. and at his decease to descend to his family to be divided among them in accordance with the laws of the State of Maine." The next paragraph was as follows: "In order to carry out the provisions of this my last will and testament, I hereby direct my executors hereinafter named to bargain sell and dispose of all my real estate in Clinton aforesaid, either at private sale or public auction as in their judgment they may deem wisest and best, to make deed or deeds for conveyance of same." In the preceding portion of the will was a bequest of $7,000 in trust for the testatrix's brother C. for life with a remainder to two of his children alternatively. The will was made about three weeks before the death of the testatrix. Her personal property was insufficient by the amount of $5,000 to pay charges, debts and legacies, and the residue consisted wholly of real estate. *Held*, that the residue was to be converted into personal property and was bequeathed to the testatrix's brother C. absolutely.

BILL IN EQUITY, filed in the Probate Court for the county of Worcester, June 3, 1902, by the executors under the will of Ellen H. Worcester, late of Clinton, for instructions.

The Probate Court made a decree that by the true construction of the will the proceeds of real estate sold by the executors and remaining after the payment of debts, charges of administration and pecuniary legacies should be divided among the heirs at law of Ellen H. Worcester as intestate property, and that, inasmuch as the personal property of the deceased was insufficient to pay said debts, charges, and pecuniary legacies, the respondent, Charles Schillinger, and his family took nothing under the fifteenth clause of the will. The respondent Charles Schillinger appealed.

The case came on to be heard before *Hammond*, J., who at the request of the parties reserved it on the pleadings and agreed facts for determination by the full court.

Ellen H. Worcester died on January 5, 1902. Her will, dated

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December 18, 1901, and allowed on January 28, 1902, omitting the introductory clause and the attesting clauses, was as follows:

"After the payment of my just debts and funeral charges, I bequeath and devise as follows:

"First. I give and bequeath to my brother Charles Schillinger of New Gloucester, State of Maine, the income of seven thousand ($7000) dollars during his life time. The principal sum of ($7000) to be safely invested and held in trust by some suitable person to be appointed by the Selectmen of the town of New Gloucester and approved by the Judge of Probate of the County of Cumberland, State of Maine, said trustee to pay to my aforesaid brother Charles Schillinger semi-annually the income only as it shall become due.

"Second. At the decease of my brother Charles Schillinger I hereby direct my aforesaid trustee to pay over the income only of the above invested amount ($7000) to my nephew Charles Ernest Schillinger, son of my brother Charles Schillinger semi-annually as it shall become due, until he shall arrive at the age of thirty years at which age he is to come into possession of the principal sum ($7000), Provided, that my said nephew, Charles Ernest Schillinger should decease before arriving at the age of thirty years then I give and bequeath the income of the above mentioned invested amount ($7000) to my niece Helen A. Schillinger daughter of my brother Charles Schillinger to be paid to her semi-annually by my aforesaid trustee, as it shall become due, until she shall arrive at the age of thirty years, at which age she is to come into possession of the principal invested sum ($7000).

"Third. I give and bequeath to my sister Mary M. Green, now of Freeport, Maine, the sum of two hundred dollars to be paid to her within one year from my decease.

"Fourth. I give and bequeath to my brother Jeremiah Schillinger now of Danforth Washington County, Maine, the sum of two hundred dollars to be paid to him, within one year from my decease.

"Fifth. I give and bequeath to my niece Harriet E. Schillinger now of Poland, Maine, the sum of two hundred dollars to be paid to her within one year from my decease.

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"Sixth. I give and bequeath to my niece Mary Ellen Dunn now of San Francisco, California the sum of two hundred dollars to be paid to her within one year from my decease.

"Seventh. I give and bequeath to my three nieces Mary Schillinger, Betsy Schillinger and Ellen W. Deering, daughters of my brother Jeremiah Schillinger now of Danforth, Washington County, Maine, to each the sum of two hundred dollars to be paid to each of them within one year from my decease.

"Eighth. I give and bequeath to my two nieces Ellen H. Harrington and Addie Hodson, daughters of my sister Mary W. Green, now of Freeport, Maine to each the sum of two hundred dollars to be paid to each of them within one year from my decease.

"Ninth. I give and bequeath to my niece Mary Gray daughter and only child of my brother Henry Schillinger the sum of two hundred dollars to be paid to her within one year from my decease.

"Tenth. I give and bequeath to my niece Annie Schillinger only daughter of my brother Charles Schillinger now of New Gloucester, Maine, the sum of two hundred dollars to be paid to her within one year from my decease.

"Eleventh. I give and bequeath to my two nephews Lewis Schillinger now of Windham, Maine and Benjamin Schillinger now of Poland, Maine, sons of my brother Daniel Schillinger, to each, the sum of twenty five dollars to be paid to each of them within one year from my decease.

"Twelfth. I hereby order and direct my executors hereinafter named to procure and set up on my lot No. 205 in Woodlawn Cemetery, Clinton, Mass. an appropriate monument of quincy Granite with inscription of names thereon of persons buried on said lot, inscriptions to be on head stones, and the name Worcester, on monument, all at a cost not exceeding one thousand dollars. Also the right to use sell or dispose of the granite monument and curbing around said lot. Providing I have not had it done and completed during my lifetime.

"Thirteenth. I give and devise to the town of Clinton the sum of one hundred and fifty dollars the interest only to be expended under the direction and supervision of the Cemetery Committee appointed by the town of Clinton for the perpetual

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care of my lot #205 in Woodlawn Cemetery Clinton Mass. and in accordance with the By Laws of said town of Clinton.

"Fourteenth. I give and bequeath the sum of three thousand ($3000) dollars to be held in trust by some suitable person to be appointed by the selectmen of the town of Poland, Maine, and approved by the Judge of Probate, of the County in which said Poland is situated and the income only to be expended for the support of my nephew Benjamin Schillinger and his sister Harriet E. Schillinger. At their decease the principal sum ($3000) to descend to the family of the said Benjamin Schillinger and divided among them in accordance with the laws of the State of Maine.

"Fifteenth. I give and bequeath all the rest and residue of my personal property to my brother Charles Schillinger and at his decease to descend to his family to be divided among them in accordance with the laws of the State of Maine.

"Sixteenth. In order to carry out the provisions of this my last will and testament, I hereby direct my executors hereinafter named to bargain sell and dispose of all my real estate in Clinton aforesaid, either at private sale or public auction as in their judgment they may deem wisest and best, to make deed or deeds for conveyance of same.

"Seventeenth. I ordain and appoint Joshua Thissell and Jonathan Smith of Clinton, Mass. as sole executors of this my last will and testament."

Here followed the attesting clauses with the signatures of the testatrix and the witnesses.

The bill prayed for instructions upon the following questions:

"First: Does the fifteenth paragraph of said will give to said 'Charles Schillinger and at his decease to descend to his family' the entire residuum of said estate, whether the same be real or mixed estate, as well as the personal property specially named in said paragraph?

"Second: Who are entitled to the residuum if the same being real estate, Charles Schillinger and family, or is the same to be divided among the legal heirs of said deceased by right of representation?

"Third: Are proceeds of the real estate, if the same should be sold by the executors as provided in the sixteenth paragraph

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of said will, to be treated by them in the final distribution as real estate or as personal property under the laws of Massachusetts?

"Fourth: Do the provisions of said paragraph fifteen create a trust in favor of the children or heirs at law of Charles Schillinger or is the gift absolute to him without any trust?"

G. H. Sturgis, (of Maine,) *& D. I. Walsh*, for the defendant Charles Schillinger.

A. F. Moulton & L. M. Webb, for the defendant Jeremiah Schillinger and others.

BRALEY, J. In the interpretation of the will of the testatrix and in order to ascertain her intention all the clauses of the instrument are to be considered, and given effect where this is possible unless such a construction becomes inconsistent with her manifest purpose. *Shattuck* v. *Balcom*, 170 Mass. 245, 251.

Between the date of its execution and her death a period of less than a month elapsed, and upon the will being admitted to probate the inventory disclosed the value of the real estate to be largely in excess of the personal property, and it must be presumed that she knew that the latter was insufficient to pay the pecuniary legacies, and that the realty would have to be sold for this purpose.

But the appellees urge that the power to convert given to the executors is not general, and is qualified by a limitation to the use of so much of the proceeds as may be necessary to pay the legacies found in the first fourteen clauses, and after this has been done if the whole has not been used, the remainder is impressed with a resulting trust in favor of her heirs at law, as the fund takes the place of the land out of which it arose. *Blake* v. *Dexter*, 12 Cush. 559, 570. *Holland* v. *Cruft*, 3 Gray, 162, 180.

It was within her power to limit such sale to so much as might be needed to make up any deficiency after the personalty had been exhausted, but instead of this she directed by the sixteenth clause that the executors should convert the real property into personal, and conferred upon them ample power to accomplish this object.

On resort being had to the language used its significance is apparent, "In order to carry out the provisions of this my last

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will and testament, I hereby direct my executors . . . to . . . sell and dispose of all my real estate . . . ." By these words no discretionary authority is given, but the direction is imperative, and the executors are absolutely obliged to make the conversion, and its proceeds are thereafter to be held and treated as personal property, for the gifts to the legatees, including the residue, are bequests of money which could only be paid after the sale.

This clause would have no greater force as an indication of her general intention if it preceded the other parts of the will, for it is a well settled rule of construction that words, sentences and clauses may be transposed if by the transposition the purpose of a testator is found, and thereby all the provisions of a will are harmonized and given effect. *Claflin* v. *Ashton*, 128 Mass. 441, 443. *Boston Safe Deposit & Trust Co.* v. *Coffin*, 152 Mass. 95, 98.

If this rule is applied to the will under consideration none of its articles are found to be inconsistent, but all form part of a plainly expressed design for the distribution under it of her entire estate.

After making provision for the improvement and permanent care of her burial lot she makes a number of bequests, all of which are general legacies, and in no instance is there a devise of any portion of the realty, and it may fairly be inferred that she must have intended that her executors should change all her real estate into money, and this united with the personal property provided a common fund from which these legacies were to be paid, and if any residue was left it should go to her brother. *Hammond* v. *Putnam*, 110 Mass. 232.

As she gave to the proceeds of the real estate the quality of personalty the equitable conversion may be considered as actually made at her death, and must be distributed as she intended. *Hammond* v. *Putnam*, *ubi supra*. *Perkins* v. *Coughlan*, 148 Mass. 30.

By this construction a partial intestacy is avoided and all the provisions of the will are given their appropriate effect, a conclusion to be preferred rather than a result which rejects the fifteenth clause, and construes the sixteenth as giving the executors an authority to sell, but limited to the extent of making up

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any deficiency of personalty, and after this has been completed gives to the surplus remaining the quality of real property.

It must therefore be held that after the payment of debts, general legacies and charges of administration, the residue is to be paid to Charles Schillinger, who takes an unlimited use of the gift; as the testatrix by the first clause of her will had created a trust for his benefit, and if she had intended a similar restriction in his enjoyment of her further bounty, she would not have employed language the legal effect of which was sufficient to vest in him a full and unrestricted right to the possession of the principal. *Homer* v. *Shelton*, 2 Met. 194, 206. *Howland* v. *Howland*, 100 Mass. 222. *Taggard* v. *Piper*, 118 Mass. 315. See *Chase* v. *Chase*, 132 Mass. 473; *Sherburne* v. *Sischo*, 143 Mass. 439, 442.

The decree of the Probate Court must be reversed, and a decree entered in accordance with this opinion.

So ordered.

COMMONWEALTH *vs.* ASA H. JOSSELYN.

Suffolk. May 20, 1904. — June 22, 1904.

Present: KNOWLTON, C. J., LATHROP, HAMMOND, LORING, & BRALEY, JJ.

Marriage. Polygamy. Statute. Constitutional Law. Words, "In force."

If a man against whom a decree for divorce has been obtained under Pub. Sts. c. 146, making it illegal for him to marry again within two years from the entry of the final decree, marries within that period a woman who marries him in good faith in the full belief that his former marriage has been annulled by divorce, and the parties continue living together as husband and wife in good faith on the part of the wife until the impediment is removed by the expiration of the two years, their marriage becomes valid under St. 1895, c. 427, and a third marriage by the husband while the second wife is living is polygamous.

Under St. 1895, c. 427, making valid certain marriages where the parties continue to live together after the removal of an impediment, which applies to cases where at the time of the marriage ceremony "a former husband or wife of one of the parties was living, and the former marriage with such person was still in force", the words "in force" include a case where the former marriage although annulled for all other purposes by a final decree of divorce under Pub. Sts. c. 146, was in force under § 22 of that chapter for the purpose of making illegal a marriage of the husband within two years from the time of the entry of the final decree.

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St. 1895, c. 427, making valid certain marriages where the parties continue to live together after the removal of an impediment, applies to a case where a final decree of divorce against the husband under Pub. Sts. c. 146, entered before the passage of the act made it illegal for him to marry again within two years from the entry of the decree and he having done so the impediment was removed by the expiration of the two years after the enactment of the statute; and so applied the statute is constitutional. Following *Lufkin* v. *Lufkin*, 182 Mass. 476.

INDICTMENT for polygamy found and returned on December 12, 1903.

At the trial in the Superior Court before *Bond*, J., the jury returned a verdict of guilty; and the defendant alleged exceptions.

T. H. Buttimer & W. G. Harrington, for the defendant.

J. D. McLaughlin, Second Assistant District Attorney, for the Commonwealth.

KNOWLTON, C. J. The defendant was indicted for the crime of polygamy, the allegation being that on November 9, 1903, he unlawfully married Cora F. S. Trommer, having at the time of this marriage, a lawful wife living, other than said Trommer. It was proved and not disputed that, on June 15, 1896, he married one Linda Wiley, and that they lived together as husband and wife from that date to November 2, 1903, and became the parents of children, two of whom are now living. Linda Wiley was living at the time of the trial, and she testified under the name of Linda G. Josselyn. The principal question is whether she was the lawful wife of the defendant when he married Trommer.

It appeared that he was married, on July 20, 1887, to Florence J. Burton, who subsequently brought a libel for divorce against him for desertion. On May 10, 1894, a decree of divorce *nisi* was entered on this libel, which was made absolute on November 11, 1894, under the Pub. Sts. c. 146, § 22. The defendant, being the party against whom the divorce was granted, could not lawfully marry again within two years of the entry of the final decree, and it therefore appears that his marriage with Linda Wiley was originally invalid. But the Commonwealth contends that under the St. 1895, c. 427, entitled "An Act relative to marriage and the legitimacy of children," it became valid from and after the removal of the impediments to the marriage by the expiration of the two years from the time of the decree

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of divorce absolute. There was evidence tending to show that the second marriage contract was entered into with due legal ceremony, that the parties thereafter lived together as husband and wife, that the marriage was entered into by the wife in good faith, in the full belief that the former marriage had been annulled by divorce, that the impediment to the marriage was removed by the decree of divorce previously entered and the lapse of two years from the entry of the decree, and that the parties then continued to live together as husband and wife, the wife acting in good faith. Under the instructions of the court the jury must have found all these propositions in favor of the contention of the Commonwealth, and in accordance with the testimony of Linda G. Josselyn. It follows that she and the defendant are deemed to have been legally married, and their children are deemed to be legitimate issue of both parents, if it can be said that, at the time of the marriage, the former marriage was still in force within the meaning of the statute. The statute applies only to cases in which at the time of the "marriage ceremony, a former husband or wife of one of the parties was living, and the former marriage with such person was still in force."

This is a remedial statute intended for the protection of persons who marry innocently and in good faith, and of their children. It is intended to cover cases in which the marriage is invalid by reason of a previous marriage of one of the parties, that makes it illegal for him or her to contract a second marriage. In this case, for many purposes, the former marriage was not in force at the time of the second marriage. But in reference to the subject to which the statute relates it was in force. It was in force as a restraint upon this defendant which precluded him from entering into a lawful marriage. The words "in force" are used in reference to the effect of the former marriage upon the right of the party to marry again. They are not used in reference to the effect of the marriage upon rights of property, or upon the personal relations of the former husband and wife. As to such matters, and as to the right of the libellant to marry again, the former marriage was not in force. But, as to the matters for which this statute was designed to provide a remedy, it was in force.

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The question to be determined in the construction of the statute is not affected by the fact that it arises upon the trial of an indictment. It is precisely the same as if an issue of the legitimacy of the children were before the court in a civil suit. The jury were rightly instructed that, upon the facts stated, the marriage was in force within the meaning of the statute, and upon the findings of the jury the statute was applicable.

The impediment was removed by a proper decree of divorce. It is immaterial that the decree had been entered before the marriage in question. It had not then removed the impediment, because the law provided that the impediment should continue until the expiration of two years from the entry of the decree of divorce. When the time expired, the removal of the impediment was effected by the decree.

This statute is applicable to cases in which the divorce was granted before its enactment, and the removal of the impediment, by the expiration of two years, occurred after its enactment. The statute, so applied, is constitutional. The question raised upon this part of the case was expressly decided in *Lufkin* v. *Lufkin*, 182 Mass. 476.

Exceptions overruled.

C. HELEN DOWNER & others *vs.* FRANK O. SQUIRE & others, executors.

Suffolk. January 11, 1904. — June 23, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Limitations, Statute of. Bond. Trust, Termination.

A trustee gave a bond to the beneficiaries interested in a certain sum of money received in trust by him, with the condition, that in the event of his ceasing to hold the sum as trustee by reason of death or otherwise his executors or administrators should pay the sum with all income therefrom then due to such person as the beneficiaries or the Probate Court should designate "to receive said sum", and in the meantime the trustee should pay to the beneficiary for life, a net income of at least five per cent per annum on the fund. On the same day the trustee and the beneficiaries executed an agreement in writing that the trustee

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instead of investing the fund should lend it to a firm consisting of himself and the sureties on his bond. The trustee died and executors under his will were appointed, filed bonds and gave notice of their appointment. Seven years thereafter a new trustee was appointed to hold the fund, and in three months made a demand for the fund on the executors of the first trustee. Within a year from the appointment of the new trustee the beneficiaries of the trust brought an action against the executors of the first trustee on the bond of their testator. Before this action was brought the new trustee had petitioned the Probate Court for an order to the executors of the first trustee to retain sufficient property in their hands to satisfy the claim, and that court made the order, the accounts of the executors not having been settled. *Held*, that the action of the beneficiaries against the executors was not barred by the special statute of limitations because there was no default on the bond until demand was made for the money after the appointment of the new trustee; *also*, that the petition for the retention of assets was presented seasonably, and being for the same claim it did not matter that it was presented by the new trustee instead of by the plaintiffs; *also*, that the agreement permitting the first trustee to use the trust fund in his business did not terminate his liability as trustee, except so far as it was changed by the agreement; *also*, that the action was not barred by the general statute of limitations, for, although no demand was made until more than six years after it could have been made, the action was brought within twenty years from the execution of the bond; *also*, that it was no bar to the action that the accounts of the first trustee were not fully settled when it was brought, as the bond was not a general one to secure the faithful discharge of the trust, but was given to secure the payment of a specified sum of money.

An executor who also is trustee under the same will is liable as executor for assets in his hands until his account as executor has been filed and allowed in the Probate Court.

CONTRACT against the executors under the will of John P. Squire, late of Arlington, for alleged breach of the condition of a bond dated July 1, 1884, given by John P. Squire as principal and Frank O. Squire and Fred F. Squire as sureties. Writ dated December 20, 1900.

The case came on to be heard before *Hammond*, J. upon an amended declaration, an amended answer and certain documentary and oral evidence. The justice reserved the case for determination by the full court on the amended declaration, the amended answer and the evidence which was introduced so far as material.

The bond sued upon was as follows:

"Know all men by these presents: That we, John P. Squire, as principal, and Frank O. Squire and Fred F. Squire, as sureties, all of Arlington, in the County of Middlesex and Commonwealth of Massachusetts, are held and stand firmly bound unto C. Helen Downer, Roswell C. Downer, Frank W. Downer and

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Samuel T. Downer, all of Somerville, in said County of Middlesex, in the sum of fifty thousand dollars, to be paid to said C. Helen Downer, Roswell C. Downer, Frank W. Downer and Samuel T. Downer, or their respective executors, administrators or assigns, for which payment well and truly to be made we do jointly and severally bind ourselves, our heirs, executors and administrators firmly by these presents.

"Sealed with our seals.

"Dated the first day of July, A. D. 1884.

"The condition of this obligation is such:

"That, Whereas on the fourteenth day of December, A. D. 1881, an agreement was made by and between the late Cutler Downer, deceased, of Somerville aforesaid, and C. Helen Adams, now C. Helen Downer, widow of said Cutler Downer, that in the event of their marriage with each other she should 'receive from the executor or administrator of the said Downer on his decease and the settlement of his estate . . . the net income from the sum of forty thousand dollars during her life and payable semi-annually; the said forty thousand dollars to be held and invested by some person to be designated by will of said Downer, or, if he shall die intestate, by the Judge of the Probate Court for the County in which the said Downer shall last dwell'; and

"Whereas said Cutler Downer having died intestate on the thirtieth day of May, A. D. 1884, George M. Brooks, Judge of the Probate Court for the County of Middlesex, in which said Downer last dwelt, has duly designated as said trustee John P. Squire aforesaid; and

"Whereas said John P. Squire has accepted said trust and hereby acknowledges that on the first day of July, A. D. 1884, he received the sum of forty thousand dollars from Roswell C. Downer and Frank W. Downer, the administrators of the estate of said Cutler Downer, to be held, invested and finally distributed as set forth in said agreement:

"Now, therefore, if said John P. Squire shall well and truly pay to said C. Helen Downer during her life a net income from said forty thousand dollars of five per cent of said sum or more, said income to be paid semi-annually or oftener, if said John P. Squire and C. Helen Downer so agree;

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"And if he shall pay to the legal representatives of said C. Helen Downer any and all income which shall accrue between the date of her decease and the date of the last payment of income as aforesaid which shall have been made to her prior to her decease;

"And if within thirty days after the decease of said C. Helen Downer he shall make an equal distribution of said forty thousand dollars, together with any and all income therefrom which shall accrue between the date of the decease of said C. Helen Downer and the date of making said distribution among Roswell C. Downer, Frank W. Downer and Samuel T. Downer or their respective legal representatives, and if in the event of his ceasing to hold said sum of forty thousand dollars as trustee, by reason of death or otherwise, said John P. Squire or his heirs, executors or administrators shall pay said sum, together with any and all income therefrom which may and shall then be due, to such person as may and shall be designated by said C. Helen Downer, Roswell C. Downer, Frank W. Downer and Samuel T. Downer, or their legal representatives; or in case of no agreement between said persons, to the one who may and shall be designated by the Judge of the Probate Court in and for the County of Middlesex aforesaid; or to some person who may and shall be otherwise legally designated to receive said sum,

"Then this obligation shall be void; otherwise it shall remain in full and effect.

"John P. Squire. [Seal]
Frank O. Squire. [Seal]
Fred F. Squire. [Seal]

"Witness,
"John Herbert,
to all."

"Boston, July 1st, 1884.

"Received of Roswell C. Downer and Frank W. Downer, in their capacity as administrators of the estate of Cutler Downer, forty thousand dollars, to be held and invested by me for the use and benefit of C. Helen Downer. Another acknowledgment of said sum has also been made in a bond of even date herewith.

"Witness — John P. Squire.
"John Herbert."

An agreement between the parties to the bond and of the same date was as follows:

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"Know all men by these presents: That whereas it is provided by the terms of an ante-nuptial contract, made on the fourteenth day of December, A. D. 1881, by and between the late Cutler Downer, deceased, of Somerville, in the County of Middlesex and Commonwealth of Massachusetts, and C. Helen Adams, now C. Helen Downer, widow of said Cutler Downer, that on the decease of said Cutler Downer and the settlement of his estate, his administrators should pay the sum of forty thousand dollars to some person to be designated as trustee in the manner therein set forth, and that said trustee should hold and invest said sum for the use and benefit of said C. Helen Downer, and should pay to her semi-annually during her life the net income from said sum of forty thousand dollars; and

"Whereas, John P. Squire, of Arlington, in the County of Middlesex aforesaid, has been duly designated as said trustee,

"Now, therefore, in consideration of the acceptance of said trust, it is hereby understood and agreed by and between said John P. Squire and C. Helen Downer, Roswell C. Downer, Frank W. Downer and Samuel T. Downer (being all of the persons having any right, title or interest in or to said sum or the income thereof), that instead of investing said sum of forty thousand dollars, said Squire shall be allowed and is hereby granted permission to loan said sum to the firm of John P. Squire & Co., composed of said John P. Squire, Frank O. Squire and Fred F. Squire, all of Arlington aforesaid, and having their usual place of business in Boston, in the County of Suffolk and Commonwealth aforesaid; but said agreement and permission shall not be construed as releasing in any respect said John P. Squire or any one of his sureties from any of the obligations contained in a bond of even date herewith, given by said John P. Squire, as principal, and said Frank O. Squire and Fred F. Squire, as sureties, to said C. Helen Downer, Roswell C. Downer, Frank W. Downer and Samuel T. Downer.

"It is further understood and agreed that any income from said sum of forty thousand dollars which shall accrue between the date of the decease of said C. Helen Downer and the last payment to her of any of the income from said sum, shall be paid to her legal representatives.

"In witness whereof we set our hands and seals to this and

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to another instrument of like tenor and date, on this first day of July, A. D. 1884.

"John P. Squire. [Seal]
C. Helen Downer. [Seal]
Roswell C. Downer. [Seal]
Frank W. Downer. [Seal]
Samuel T. Downer. [Seal]

"Witness —
"John Herbert,
to all."

The proceedings in the Probate Court upon the petition of John Herbert, successor of John P. Squire as trustee, mentioned in the opinion, were as follows:

"To the Honorable the Judges of the Probate Court in and for the County of Middlesex:

"Respectfully represents John Herbert, of Somerville, in the County of Middlesex and Commonwealth of Massachusetts, as he is trustee in place of John P. Squire, under a certain instrument in writing, dated December 14, 1881, filed in the Probate Office for Middlesex County, wherein Cutler Downer, late of said Somerville, deceased, gave certain estate in trust for the benefit of C. Helen Downer, called in said instrument C. Helen Adams; that at a Probate Court, holden at Cambridge, in and for said County, on the seventh day of February, 1893, Frank O. Squire, Fred F. Squire and John P. Wyman were duly appointed Executors of the last will of said John P. Squire, late of Arlington, in said County, deceased, and the bond given by each of them for the faithful discharge of said trust was approved by the Judge of said Court; that said Executors have given due notice of their said appointment; that your petitioner has a just claim against the Estate of John P. Squire, a full statement of which is hereto annexed and marked 'A,' but that the right of action on said claim did not accrue within two years after the giving of said bonds by said Executors, and said estate is not fully administered.

"Wherefore your petitioner prays that said Executors may be ordered to retain of said Estate sufficient property to satisfy said claim, and that such other orders may be made in the premises as justice may require.

"Dated this twenty-fifth day of October, A. D. 1900.

"John Herbert, Trustee."

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"A.

"Statement of Claim.

"On the fourteenth day of December, A. D. 1881, an antenuptial contract was made by and between Cutler Downer and C. Helen Adams, now C. Helen Downer, by which it was provided that in case of the decease of said Cutler Downer, the sum of forty thousand dollars ($40,000) should be held and invested by some person to be designated by said Cutler Downer in his last will, or, if he should die intestate, by some person to be designated by the Judge of the Probate Court for the County in which said Cutler Downer should last dwell, and that the net income thereof should be paid to said C. Helen Downer during the rest of her life.

"Said Cutler Downer died intestate in Somerville, in the County of Middlesex, on the thirtieth day of May, 1884, and Roswell C. Downer and Frank W. Downer were duly appointed administrators of his estate.

"On or about the first day of July, 1884, John P. Squire, of Arlington, in said County of Middlesex, was informally designated by the Judge of the Probate Court for said County as the person who should hold and invest said sum as Trustee for said C. Helen Downer, and on said date said sum of forty thousand dollars ($40,000) was paid to said John P. Squire by said administrators for the purpose aforesaid.

"A bond for the faithful discharge of his duties as said Trustee was given by said John P. Squire as principal, and Frank O. Squire and Fred F. Squire as sureties, and by said bond it was provided that in case said John P. Squire should cease to hold said sum of forty thousand dollars ($40,000) as Trustee by reason of his death, or otherwise, his heirs, executors or administrators should pay said sum, together with all income therefrom which should then be due, to the one who should be designated by the Judge of the Probate Court in and for said County of Middlesex as Trustee in place of said John P. Squire.

"On the seventh day of January, 1893, said John P. Squire died in said Arlington, and no one was appointed as Trustee in his place until the tenth day of January, 1900, on which date John Herbert, the petitioner, was duly appointed as such Trustee at a Probate Court holden at Cambridge, in and for said County of Middlesex.

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"All income from said forty thousand dollars ($40,000) to December 1, 1899, has been paid monthly to said C. Helen Downer by the legal representatives of said John P. Squire, but since said date no income therefrom has been paid to her.

"On the twenty-sixth day of April, 1900, the petitioner duly demanded of the Executors of the will of said John P. Squire said sum of forty thousand dollars ($40,000) and accrued interest thereon, but neither the whole nor any part thereof has been paid, and the estate of said John P. Squire owes the petitioner the sum of forty thousand dollars ($40,000) and interest thereon from the first day of December, 1899."

"At a Probate Court holden at Lowell, in and for said County of Middlesex, on the eighteenth day of December, in the year of our Lord one thousand nine hundred, by continuance from the twenty-seventh day of November, 1900.

"On the petition of John Herbert, as he is Trustee in place of John P. Squire, under a certain instrument in writing, dated December 14, 1881, filed in the Probate Office for Middlesex County, wherein Cutler Downer, late of Somerville, in said County, gave certain estate in trust for the benefit of C. Helen Downer, called in said instrument C. Helen Adams, praying that Frank O. Squire, Fred F. Squire and John P. Wyman, executors of the will of said John P. Squire, may be ordered to retain in their hands sufficient property to satisfy the claim of the petitioner, as set forth in a 'Statement of Claim' annexed to said petition.

"Due notice having been given to each and all of said executors and appearance having been made, and assent thereto having been filed, now on this eighteenth day of December, 1900, it appearing to the Court that a claim against the estate of said John P. Squire may become justly due to said John Herbert, as he is Trustee as aforesaid, said claim not exceeding forty-five thousand dollars, the respondents are hereby ordered to retain in their hands sufficient to satisfy said claim.

"Geo. F. Lawton,

"Judge of Probate Court."

M. Storey, (*J. Herbert* with him,) for the plaintiffs.

G. L. Mayberry, (*F. L. Washburn* with him,) for the defendants.

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HAMMOND, J. This is an action at law upon a bond given by John P. Squire, the defendants' testator, who had been appointed trustee of a certain fund in which the plaintiffs, the obligees, were interested as beneficiaries. It was brought originally by John Herbert, who was appointed by the Probate Court as the successor of Squire as trustee, but the writ has been amended by substituting for Herbert the present plaintiffs.

The material condition of the bond is that "in the event of his ceasing to hold said sum of forty thousand dollars as trustee, by reason of death or otherwise, said John P. Squire or his heirs, executors or administrators shall pay said sum, together with any and all income therefrom which may and shall then be due, to such person as may and shall be designated by said C. Helen Downer, Roswell C. Downer, Frank W. Downer and Samuel T. Downer, or their legal representatives; or in case of no agreement between said persons, to the one who may and shall be designated by the Judge of the Probate Court in and for the County of Middlesex aforesaid; or to some person who may and shall be otherwise legally designated to receive said sum."

The breach relied on is the refusal of the defendants to pay said sum with interest to Herbert, Squire's successor in the trust. The chief defence is the statute of limitations.

1. As to the special statute of limitations applicable to actions against executors. It is plain upon the facts reported that no trust fund, as such, came into the hands of the defendants, and the plaintiffs do not seek to follow a specific trust fund. As to these defendants, therefore, the bond is a merely personal obligation of their testator to be enforced like any other debt or obligation. *Harlow* v. *Dehon*, 111 Mass. 195. Since the plaintiffs stand upon the footing of general creditors, they are bound by the two years' limitation unless something is shown to bring the case within some one of the exceptions to it.

John P. Squire the trustee died January 7, 1893. The defendants were appointed executors of his will February 7, 1893, on which day they filed their bond and gave due notice of their appointment. Herbert was appointed trustee to succeed Squire January 10, 1900. He made demand upon the defendants April 26, 1900, and on December 20, 1900, brought this action. The demand therefore was made and the action

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brought more than seven years after the appointment of the defendants as executors. It is contended by the plaintiffs that there was no default until the demand was made. It is urged by the defendants that while in a technical sense that may be true, still, inasmuch as it was in the power of the plaintiffs by consent or by application to the judge of the Probate Court to cause to be appointed or designated at any time after the death of the defendants' testator a person who could have made the demand upon the defendants within two years from their appointment, it was the duty of the plaintiffs to do so, and that having failed in that duty they cannot now say that their claim could not have been prosecuted within the two years. But we are not much impressed by this argument. It is plain that the breach did not occur until the demand and that the claim is therefore within the plain reading of the statute. The case of *Hall* v. *Bumstead*, 20 Pick. 2, upon which the defendants rely, was against the heirs of the deceased, and the language fixing the liability of heirs differs very much from that fixing the liability of executors; and we cannot read into this latter statute the words of the former upon which the decision in *Hall* v. *Bumstead* was made.

We are also of opinion that the petition to the Probate Court was presented before the estate was finally settled by the defendants. While Wyman, one of the executors and trustees, testified that in 1898 the personal assets of the estate were turned over from the account of the defendants as executors to their account as trustees, and that their account as executors was closed on the books, still he further testified that what he meant by this was that "the executorship was closed as far as the accumulation of any income was concerned, and that the administration of the estate as a trust estate began from and after said date." The defendants were executors and trustees. They filed no account as executors until May 13, 1902, more than a year after this action was begun, and in this account charged themselves with a balance amounting to more than enough to meet this claim, and no account of the executors has been settled. Under these facts it must be held that the petition for the retention of assets was seasonably presented. *Hall* v. *Cushing*, 9 Pick. 395. *Crocker* v. *Dillon*, 133 Mass. 91, 98. It is urged by the

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defendants that the statute requires the application to be made by the party who can bring an action on the claim, and that the claim must be the same one upon which the action is afterwards brought. There can be no doubt that the claim must be substantially the same. It is perfectly plain, however, from the petition and the full statement accompanying it, that the petitioner, who as the successor of Squire was legally entitled to the trust fund, was seeking to have reserved in the hands of the executors the amount due from Squire's estate upon this bond as trustee. It is also plain that this action is brought on that bond for the purpose of recovering that sum; and that whatever the plaintiffs may recover is in liquidation of that debt and must go to the hands of Herbert, the petitioner, as trustee. We cannot agree with the contention of the defendants that the agreement made between the plaintiffs and Squire, under which he was authorized to lend the money to the firm of which he was a member, wholly annulled the trusteeship as between the parties. It is true that by the agreement between the *cestuis que trust* and Squire, as shown in the bond and contemporaneous paper, his liability as trustee was considerably different from what it would have been had no such agreement been made. In the absence of such an agreement he would have had no right to lend the money to the firm of which he was a member, he would have been accountable to C. Helen Downer, the life beneficiary, only for the net income, would have been entitled to a reasonable compensation, would not have been responsible for loss unless caused by his failure to perform his duty, and would have been answerable only for the fund remaining in his hands. Under the agreement the *cestuis que trust* were estopped to contend that the loan to the firm was a breach of the trust; the beneficiary for life was entitled to receive five per cent per annum as the income of the fund whether that per cent was earned or not; the trustee was entitled to no compensation; and, if there was any loss through fault on his part or from any other cause, he was to be responsible for it, and was absolutely bound to pay the sums named in the condition of the bond. In these and perhaps other respects the liability of Squire varied from that of an ordinary trustee. And yet the trust was not entirely annulled. The money was received by him as trustee duly appointed, and was to be paid

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by him upon "his ceasing to hold said sum . . . as trustee, by reason of death or otherwise" to his successor in the trust. All this clearly appears from the bond and the contemporaneous paper. It was not the intention of the parties, nor was it the legal effect of the agreement, that Squire should cease to act as trustee. He was still a trustee and liable as such, except so far as the ordinary liability was changed by the agreement.

Although there is no specific trust fund with earmarks in the hands of the defendants, and therefore they cannot be held upon the ground that they are in possession of a particular trust fund in no way belonging to them as executors which they ought to pay over to their testator's successor in the trust, but, as before stated, are answerable on this bond to the plaintiffs in the same way only as to any general creditor under a sealed instrument, yet nevertheless as between the parties to the bond the trusteeship lasted until the death of Squire, except as modified by the agreement, and the amount recovered in this suit will be held under the terms of the trust as originally created. The sum due from the estate of the testator as trustee was the "claim" to satisfy which the defendants were ordered to retain in their hands sufficient funds, and the sum thus due is the sum to be recovered in this action. The petitioner as trustee is the person who was entitled to receive that sum in that capacity, and the person entitled to the proceeds of this suit. The merely technical rule that the action must be brought in the name of the plaintiffs cannot be regarded as fatal. In substance and effect, within the legal meaning of the statute, the party who made the application is the same who brings this suit, and the claim set forth in the petition, upon which is based the decree of the Probate Court, is that upon which the action is brought. See *Hammond* v. *Granger*, 128 Mass. 272. The special statute of limitations therefore is no bar to this action.

2. As to the general statute of limitations. No demand under the contract was made until more than seven years after it could have been made, and after the appointment of the defendants as executors. The defendants contend that this demand was not seasonably made; that it should have been made within a reasonable time, which, by analogy with the general statute of

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limitations, they say would not exceed six years; and that inasmuch as it was not made within that time there is no liability on the bond. Here, as elsewhere in the consideration of this case, it must be borne in mind that this is not an action seeking to recover the money received by the testator upon the ground of an implied contract to repay it; and we are not considering whether such an action would be barred by the statute. This is an action upon a bond, and a cause of action arising under it is not barred until the expiration of twenty years at least from the time when in law it arose.

In some respects the decisions upon this branch of the law are conflicting, some courts holding that the statute does not begin to run until after a demand, no matter how long delayed, (*Thorpe* v. *Coombe*, 8 Dowl. & Ry. 347; *Rhind* v. *Hyndman*, 54 Md. 527,) some that it begins to run at once whether a demand be made or not, (*Palmer* v. *Palmer*, 36 Mich. 487; *Ware* v. *Hewey*, 57 Maine, 391,) and some holding that it does not begin to run until after a reasonable time for making the demand has expired. *High* v. *County Commissioners*, 92 Ind. 580. The subject has been discussed, many of the authorities being cited in support of each view, in *Shaw* v. *Silloway*, 145 Mass. 503, and *Campbell* v. *Whoriskey*, 170 Mass. 63. In the latter case the conclusion is reached that the true principle is that the demand should be made within a reasonable time, and that "where there is nothing to indicate an expectation that a demand is to be made quickly, or that there is to be delay in making it, . . . the time limited for bringing such an action after the cause of action accrues should ordinarily be treated as the time within which a demand must be made." If this language is to be literally taken, then, inasmuch as the cause of action on the bond would not be barred until the expiration of twenty years, the demand might be made at any time within twenty years, and the life of the bond might reach forty years. But this language was used in a case where the limitation of six years applied to the cause of action, and was not intended to be applicable to an action upon an instrument where the time within which an action may be brought is more than six years.

The rule that the demand should be made within a reasonable time is founded upon the presumed intention of the parties that

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the liability shall not be indefinitely extended, and is established simply for the purpose of carrying out that intent. It is not intended to affect the nature of the contract in any other way. No case has been shown us, nor do we know of any, in which it has been applied so as to shorten the time within which the action could have been brought if the demand had been made at once. The statute of limitations applicable to a cause of action under this bond, even if existing simultaneously with the execution of the bond, is twenty years; and the principle invoked by the defendants should not be applied to reduce the time to a shorter period. Even if the demand was not made within six years, it was made early enough for this action to be brought well within twenty years from the execution of the bond; and that is sufficient. The time for the continuation of the liability is not extended beyond the time contemplated by the parties, and a rule established solely to prevent an illimitable extension of time should not be applied to reduce the time to a shorter period than that originally contemplated by the parties. This case does not require us to go further. We make no intimation as to what the rule should be if an action be brought after the expiration of the twenty years from the execution of the bond upon a demand made more than six years after such execution. The present action being supported by a previous demand, and being brought within twenty years from the execution of the bond, is not barred by the general statute of limitations. See *Keithler* v. *Foster*, 22 Ohio St. 27.

It follows that the action is not barred by any special or general statute of limitations.

The defendants further contend that if their testator is to be regarded as trustee, and this bond as an obligation conditioned for the faithful performance of his trust, no action at law can be brought until the accounts of the trustee are fully settled. But it is to be noted that this is not a general bond given for the faithful discharge of his trust. It is rather a special bond given in consideration of the permission to do an act for which he otherwise would be held answerable as for a breach of trust. It is conditioned for the payment of a certain sum therein particularly specified. To such a bond the rule, for obvious reasons, is not applicable.

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There must be judgment for the plaintiffs for the penal sum named in the bond, and execution is to issue for the sum which shall be found due by the court.

So ordered.

JOHN M. SAVAGE *vs.* MARLBOROUGH STREET RAILWAY COMPANY.

Middlesex. January 27, 1904. — June 23, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Negligence, Res ipsa loquitur. Practice, Civil, Exceptions.

In an action against a street railway company for an injury received by a passenger in a car of the defendant from a collision with another car of the defendant moving in an opposite direction on the same track, no exception lies to the refusal of the presiding judge to rule that the mere fact of the collision is not evidence of negligence, if there is the additional fact that the defendant offered in evidence no explanation of the collision.

In an action of tort against a street railway company for personal injuries alleged to have been caused by the defendant's negligence, where the defendant has not demurred to the declaration and has tried its case on the issue of negligence, it cannot, by an exception to the refusal of a ruling that on the pleadings and the evidence the plaintiff is not entitled to recover, raise the point that the declaration contains no allegation of negligence or intentional harm on the part of the defendant.

No exception lies to the whole charge of a judge.

TORT by a passenger in a car of the defendant for injuries from a collision of the car on which the plaintiff was a passenger with another car of the defendant. Writ dated August 20, 1902.

At the trial in the Superior Court before *Bishop*, J., the jury returned a verdict for the plaintiff in the sum of $4,250; and the defendant alleged exceptions, raising the questions stated by the court.

G. W. Cox, for the defendant.

C. F. Choate, Jr., for the plaintiff, was not called upon.

BARKER, J. At the trial it appeared that the plaintiff while a passenger and in the exercise of due care was hurt by a collision of two of the defendant's cars moving in opposite directions on the same track. The case is here upon the defendant's ex-

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ceptions to the refusal of the judge to give three rulings and to the charge as a whole.

The first request was to the effect that if the collision was not due to negligence of the defendant the plaintiff could not recover. This request was covered in that portion of the charge in which the jury were told that the plaintiff started with the undertaking upon him to prove negligence on the part of the defendant.

The second request was that the mere fact that there was a collision of the defendant's cars was not *prima facie* evidence that it resulted from negligence of the defendant. The judge was not bound to give an instruction whether the mere fact of the collision was evidence of negligence. There was not only the fact of the collision but also the fact that the defendant offered in evidence no explanation and nothing to show that it happened without the defendant's fault. This required the refusal of the second request and the giving of the instruction which was given. *Feital* v. *Middlesex Railroad*, 109 Mass. 398.

The third request was for the ruling "In the pleadings and evidence in this case the plaintiff is not entitled to recover." The contention that this ruling should have been given is unsound. The argument made in support of it is that neither negligence nor intentional harm are specifically alleged in the declaration. There was no demurrer to the declaration nor was the objection now attempted to be raised specifically pointed out at the trial. On the contrary the defendant's first request and the charge to the jury make it certain that upon the pleadings as they stood the defendant tried its case as an action for negligence. There is no occasion to inquire whether the declaration would have been good upon demurrer. See *May* v. *Princeton*, 11 Met. 442; *Raymond* v. *Lowell*, 6 Cush. 524.

The exception to the charge as a whole must be overruled in accordance with the usual doctrine that no such exception lies. See *Dixon* v. *New England Railroad*, 179 Mass. 242; *Leverone* v. *Arancio*, 179 Mass. 439; *Robbins* v. *Stoughton Mills*, 183 Mass. 86; *D'Arcy* v. *Mooshkin*, 183 Mass. 382; *Henderson* v. *Raymond Syndicate*, 183 Mass. 443. The matters to which attention was called by the first and second requests were correctly dealt with in the charge.

Exceptions overruled.

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JAMES DRONEY *vs.* JOHN F. DOHERTY & another.
THOMAS BRIGGS *vs.* SAME.

Middlesex. March 2, 1904. — June 23, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Employer's liability. *Evidence*, Remoteness.

In an action by a workman in an iron foundry against his employer for injuries from the fall of a freight elevator on which he was standing, after the plaintiff has shown that the clutches of the elevator were defective and practically useless, he may show by the testimony of experts, who made an examination of the elevator the day after its fall, that there were defects in the car and in the uprights, and that either the car would not have fallen had the clutches been in working order, or that one of the uprights was sprung so that the clutches could not catch on it, there being nothing to show that any change had occurred between the time of the accident and the examination of the elevator by the experts.

It is evidence of a failure in duty on the part of the proprietor of an iron foundry maintaining a freight elevator on which his workmen ascended and descended in going up with loads of iron to the furnace and returning for other loads, that the elevator car with workmen on it fell, either because the clutches of the elevator were out of order and failed to work or because the posts on which it ran were out of repair.

In actions by two workmen in an iron foundry against their employer for injuries from the fall of a freight elevator, it appeared, that the plaintiffs had taken up a load of iron to the furnace and stepped on the elevator car to descend. On pulling the operating cord in the usual way the car instead of descending remained stationary. One of the men, experienced in operating the elevator although he was ignorant of the method by which the power was applied, stepped off to ascertain whether the operating machinery was running and, finding that it was, went back to the car. As he stepped upon its floor it fell. The second man had remained in the car and did not know that the machinery was running until the first man told him so on his return, the announcement being practically simultaneous with the fall of the car. *Held*, that the plaintiff who stepped off the car and returned to it incurred the danger voluntarily and could not recover, but that the plaintiff who remained in the car could be found to have been in the exercise of due care.

TWO ACTIONS OF TORT by workmen in the defendants' iron foundry in Lowell for injuries from the fall of a freight elevator on which the plaintiffs were standing. Writs dated July 9, 1902.

In the Superior Court the cases were tried together before *Aiken*, J. The judge refused in each case to order a verdict for

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the defendants and submitted the cases to the jury. The jury returned a verdict for the plaintiff in each case, in the sum of $165 for Droney and in the sum of $1,375 for Briggs. The defendants alleged exceptions in both cases.

W. L. Harris, for the defendants.

F. W. Qua, for the plaintiffs.

BRALEY, J. The defendants, among other appliances used by them in their business as iron founders, ran an elevator by electricity, to raise scrap iron from the level of the foundry yard to a platform over which it was wheeled to the door of a blast furnace. It ran in a well twelve feet in depth, was operated by means of a shipping cord, and stopped automatically, at the platform or at the yard, by stops placed upon the cord. For the purpose of preventing accidents, it was provided with safety clutches that were devised to catch in the rails or ratchets placed on the vertical posts or uprights of the frame, if for any reason the motive power failed to work properly.

At the time of the accident the plaintiffs had put the load of iron into the furnace and had stepped upon the car. One of them pulled the cord; but instead of descending in the usual way, the car remained stationary, and subsequently fell a distance of ten feet, causing the injuries to recover damages for which these suits are brought.

It became obligatory on the plaintiffs to show what caused the accident; and proof of its occurrence alone was not of itself sufficient to sustain a conclusion that it arose from the carelessness of the defendants, for after the duty which they owed to the plaintiffs to provide them with reasonably safe permanent appliances with which to do their work had been pointed out, the fact of negligence in its performance remained to be affirmatively proved, as the presumption was present that this duty had been performed until the contrary appeared. *Blanchette* v. *Border City Manuf. Co.* 143 Mass. 21. *Broult* v. *Hanson*, 158 Mass. 17. *Hofnauer* v. *R. H. White Co*, *ante*, 47.

For this purpose, they first showed by one of the servants of the defendants, who had operated the elevator and knew of its previous condition, that the clutches were defective and practically useless; and then they called two experts who had made an examination the day after its fall, who testified to defects

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in the car and in the uprights, and one of them expressed an opinion that it would not have fallen if the clutches had been in working order, for they would have caught in the slots of the rack rail; while the other was of opinion that one of the uprights had sprung so that the clutches would not engage with the rail.

This evidence was admitted subject to the exception of the defendants that it was incompetent because its admission was not preceded by proof that no change had taken place in the meantime, and therefore it had no legitimate tendency to show the condition of the elevator at the time it fell.

The defendants, however, did not suggest that any change had occurred; and if such an examination could have been made immediately after the accident for the purpose of ascertaining its cause, and the result given in evidence, the intervening of one day between the event and the inspection by the experts, with the presumption that the condition of things remained the same, was sufficiently connected in time to permit the introduction of this testimony describing the structural features and state of repair of the elevator as they then appeared; and, taken in connection with the previous evidence, it all tended to show the situation existing at the time of the injury. *Cutter* v. *Hamlen*, 147 Mass. 471. *Tremblay* v. *Harnden*, 162 Mass. 383. *Laplante* v. *Warren Cotton Mills*, 165 Mass. 487.

The plaintiffs were not required, in order to make out a case, to go beyond proof of a defect; and if the car fell either because the clutches failed to work or the posts on which it ran were out of repair, this was sufficient, for it could be found that in the discharge of the duty they owed their servants the defendants could have discovered and remedied these defects, and their failure to do so was actionable negligence.

But the defendants strongly urge that there is no evidence of due care on the part of either plaintiff and for this reason they cannot prevail; and a recurrence to what happened at the time of the accident becomes necessary.

Both plaintiffs were on the car ready to descend when the operating cord was pulled in the usual way, but the car instead of descending remained stationary. Droney then stepped off to ascertain whether the operating machinery was running, and

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finding that it was he went back to the car, in which Briggs had remained, and as he stepped upon the floor the car fell.

There is nothing in the evidence to indicate that Droney was other than a man of ordinary intelligence. For a year prior to this time he had used and operated the elevator nearly every day, although he had made no investigation of the machinery and was ignorant of the method by which the power was applied; but he knew that the car did not move when he pulled the cord, and suspecting that something was wrong, he immediately went to see if the motive power had been stopped. Upon finding that the machinery was in motion, instead of remaining outside the car he voluntarily went back into it when he must have known that he had not reversed the shipping cord, and it was plainly apparent that the car was not working in the ordinary manner and was likely to descend at once.

The argument advanced in his behalf that he had a right to rely upon the clutches holding the car does not aid him, for if this occurred to him it only emphasizes his conduct in deliberately exposing himself to injury when he knew from the action of the elevator that probably it was out of order; and, if he chose to take the risk that it might fall, he was not in the exercise of due care and must abide by the result. *Murphy* v. *Webster*, 151 Mass. 121. *Degnan* v. *Jordan*, 164 Mass. 84.

This leaves for consideration the question whether the conduct of Briggs was such as to preclude his recovery. He knew all that Droney had done to start the car, and that it had proved ineffectual, but he did not know, until Droney told him, that the machinery was running; and it cannot be said, as matter of law, that up to that time he was careless in remaining, for he might have been justified in believing that for some reason the power had been stopped.

An attempt was made on cross-examination to make it appear that after he was informed a sufficient time elapsed in which he could have left the car; but in the light of all the evidence it fairly could be found that the announcement by Droney and the fall of the car were substantially simultaneous, and that no time was afforded him in which to realize and appreciate the danger, still less to deliberate how he should act to avoid it. For these reasons it cannot be said that it was error to permit the jury

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to determine this issue, and they have found that he was not negligent.

This disposes of all the questions raised by the defendants, and in the first case the exceptions must be sustained, while in the second they are overruled.

So ordered.

ATTORNEY GENERAL *vs.* MAYOR OF BOSTON & another.
HENRY W. HUNT *vs.* SAME.

Suffolk. March 3, 1904. — June 23, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Way, Laying out of highway.

The order of the county commissioners of Norfolk County made in 1844, laying out what was formerly the causeway over Mill Creek in Dorchester as a highway, required only that the road as then existing should be put in proper repair, and does not require that a certain jog about one hundred and nineteen feet long which originally was left unfilled should be included in the highway so as to make it of a uniform width of forty feet, the fact that this was the contemporaneous construction of the order by all who had occasion to work under it and that it remained unquestioned for sixty years being considered of much weight in arriving at this conclusion.

The owner of land abutting on a highway has no right to require the construction of the highway to the line of his land for convenience of access.

TWO PETITIONS, filed December 17, 1903, one by the Attorney General at the relation of Henry W. Hunt, and the other by Henry W. Hunt, personally, for writs of mandamus addressed to the mayor of Boston and the superintendent of streets of that city commanding them to construct a certain portion of Freeport Street in that part of Boston called Dorchester to the full width of forty feet, the city of Boston having been made a respondent by an amendment filed and allowed on December 29, 1903.

The cases came on to be heard together before *Loring*, J. upon the petitions, exhibits and answers, and at the request of the parties the justice reserved them for determination by the

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full court, such decree to be entered therein as justice might require.

H. W. Putnam, for the petitioners.

T. M. Babson, for the respondents.

HAMMOND, J. These are petitions, one by the attorney general of the Commonwealth at the relation of a private citizen, and the other by an abutting landowner, for a writ of mandamus to compel the respondents to construct a certain "portion of said Freeport Street to the full width of forty feet, either with a stone retaining wall or wooden bulkhead with solid filling, or with piles and planking or other suitable open construction, and to make and maintain the same open, safe, and convenient for public travel to said entire width, with strong and sufficient railing for the security of travellers on the easterly or outward side of the same."

It appears that by St. 1807, c. 13, and St. 1808, c. 17, a corporation finally called the Dorchester Mill Corporation was authorized to build certain roads, including a milldam or causeway over Mill Creek so called, in what was then the town of Dorchester, since become a part of Boston; the causeway to be forty feet in width and to contain a bridge or draw through which at proper times vessels might pass; and that as early as 1810 the causeway and bridge were built, the greater part being over flats which at high tide were covered with water several feet in depth. The causeway was built with solid filling, the retaining wall being of stone. It was forty feet wide except that on the easterly side there was a jog or recess in the wall about one hundred and nineteen feet long and five feet wide at the northerly end and seven feet wide at the southerly end, so that there was an area of about six hundred and eighty-eight square feet of the original location which was not filled; and the causeway was only thirty-three to thirty-five feet wide where it abutted this jog. The top of the causeway at this jog was from nine to eleven feet above the surface of the abutting flats. As thus constructed it was opened for public travel, and has been used continuously ever since as a public highway. It was provided (St. 1808, c. 17, § 5) that upon the completion of the dam the corporation should "receive three hundred dollars, as voted by the town of Dorchester, . . . and the town of Dor-

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chester shall be at no further expense on account of said roads, until they are accepted by the town." It does not appear that the town ever accepted the causeway as a public road.

By St. 1833, c. 104, the Tenean Free Bridge Company was incorporated, and was authorized to build a new bridge over the creek, and was charged with the duty of keeping it safe and convenient for passengers, free of toll. The corporation in due time built the new bridge in the place of the earlier one, and repaired and fenced the causeway to the width of forty feet throughout its entire length, with the exception of the jog above mentioned which remained as before.

In 1844, the county commissioners of Norfolk County passed an order laying out a highway over this causeway which for a generation had been used for public travel; and these petitions are brought to compel the completion of the work required, as the petitioners allege, by this order. It is to be noted that the order was passed sixty years ago and that the work was done soon after, but it does not appear that it ever has occurred to any person until quite recently that the work required by it was not completed in accordance with its terms. Under these circumstances we ought to look carefully at the record to see whether the interpretation for which the petitioners contend is the necessary one. They contend that the order required the road to be constructed and fitted for public travel to the full width of forty feet throughout its entire length; but we are of opinion that by a careful reading of the order it appears that such is not the necessary or even fair construction of it. It is plain from the recitals in the record that this causeway and bridge, which had been used for many years for public travel but had been maintained only by private corporations, had become dangerous to travellers, and the purpose of this order was not to change (except in one place at the north of the bridge) the outlines of the causeway as laid out or the part worked for public travel as originally constructed, but to have the road repaired and maintained as a highway by the public authorities. It is true that the record states that "the whole road, bridge and draw [is] to be repaired within two months so as to be convenient and perfectly safe for all loads, teams and travellers," but in view of the circumstances this cannot be construed as requir-

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ing the change in the jog, but simply as an order that the road as then existing should be put in proper repair. Such was evidently the contemporaneous construction of the order by all who had occasion to consider it, and at this late day that is a consideration of much weight. So far, therefore, as these petitions are based upon the theory that the work required by the order has not been done, they have no standing.

The petitioner Hunt contends in addition that the road should be so constructed as to give him access to it from his abutting land. The right of abutting landowners in this respect is stated by Knowlton, J. in *Metcalf* v. *Boston*, 158 Mass. 284, 285, in the following language: "It is contended that the abutting landowners have a right to require the construction of the road up to the lines of their lots for convenience of access. Undoubtedly they have a right of access to the road from their lots; but roads are constructed for the use of the public, and there is no law requiring cities and towns to construct approaches from the houses or lots of adjacent landowners to the travelled part of the way, or to grade and construct the way up to the lines of the lots to enhance the value of the property. If the construction of the road in a reasonable way for public use will be likely to make access to the road from a neighboring lot difficult, and to require a large expenditure on the part of the owner in the construction of a passageway, that will be taken into account in assessing the damages." This principle is applicable to the case presented in the petition of Hunt.

The conclusion to which we have come on these points renders it unnecessary to examine the other grounds of defence, some of which seem to present grave difficulties to the maintenance of the petitions.

Petitions dismissed.

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LEONARD M. ARCHIBALD *vs.* CYGOLF SHOE COMPANY.

Plymouth. March 4, 1904. — June 23, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Employer's liability.

If a foreman in a shoe factory accustomed to machinery is sent to clear and fit for occupancy an additional room recently hired by the proprietor of the factory and understands that the machinery there is not new, and if, after working off and on in this room for ten days, his sleeve is caught by a set screw in a revolving shaft while he is doing some whitewashing near it, he cannot recover from his employer for injuries thus caused, there being no negligence on the part of the employer in exposing him to a danger so well understood and apparent, even if set screws are no longer a common device and their use in other establishments has ceased.

TORT by a foreman of the treeing and dressing room of the defendant's shoe factory at Brockton for injuries caused by the plaintiff's sleeve being caught by a set screw in a revolving shaft while he was doing some whitewashing near it. Writ dated January 9, 1903.

At the trial in the Superior Court *Harris*, J., at the close of the evidence, ordered a verdict for the defendant, and at the request of the plaintiff reported the case for determination by this court. If the ruling was right judgment was to be entered on the verdict. If it was wrong the case was to stand for trial.

R. W. Nutter, for the plaintiff.

F. M. Bixby, for the defendant.

HAMMOND, J. In several cases it has been held by this court that an action would not lie for an injury received from a revolving set screw. *Ford* v. *Mount Tom Sulphite Pulp Co.* 172 Mass. 544, and cases cited. *Demers* v. *Marshall*, 178 Mass. 9, and cases cited. The plaintiff attempts to distinguish this case from many of the previous cases upon the ground that, while in those cases it appeared that the set screw was a common and well known device, in the present case there was evidence tending to show that it had ceased to be used and that a safer device had been substituted.

But while the fact that the screw was a common device has

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been regarded as an important element, still under the circumstances of this case we think the defendant not liable even if the use of such a screw in other establishments had ceased. The plaintiff was a man of maturity and had contracted to work and had been at work many years in the building in rooms where machinery was in operation. In December, 1901, the defendant company, which had occupied for several years a certain portion of the building, hired an additional room, and upon January 1, 1902, the plaintiff, who had been working for the defendant in the other rooms, went to work to clear up and fit this room for occupancy. He "worked around there off and on" until the accident, which occurred on the eleventh day of the same month. It is plain that the plaintiff understood that he was in a building where the machinery was not new, that he understood and appreciated generally the danger of revolving machinery, or that at any rate the defendant had a right to suppose that he did. He could have seen the set screw in motion. There was no danger which in view of the plaintiff's knowledge and capacity must not have been well understood by and apparent to him, and there was therefore no negligence on the part of the defendant in exposing him to it. See *Goodnow* v. *Walpole Emery Mills*, 146 Mass. 261.

It follows that in accordance with the terms of the report there must be

Judgment on the verdict for the defendant.

BANK OF AMERICA *vs.* WILLIAM G. WILSON.

Norfolk. March 10, 1904. — June 23, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Bills and Notes.

The holder of a promissory note can sue the second indorser without first demanding payment from the first indorser, and it is no defence to the action against the second indorser that the plaintiff made an agreement with the first indorser to proceed against the second indorser only.

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CONTRACT on two promissory notes for $10,000 each, made by the Driggs-Seabury Gun and Ammunition Company to its own order and indorsed by that company, by James B. M. Grosvenor and by the defendant in the order named. Writ dated April 23, 1902.

At the trial in the Superior Court before *Harris*, J., the defendant made the offer of proof stated in the first paragraph of the opinion. The judge ordered a verdict for the plaintiff in the sum of $16,388.19; and the defendant alleged exceptions.

C. K. Cobb, for the defendant.

C. E. Rushmore, (of New York,) for the plaintiff.

LORING, J. This is an action by the holder of two negotiable promissory notes against the second of two indorsers on them. The defendant admitted his liability unless the facts stated in his offer of proof constituted a defence. The defendant offered to prove that this action was brought against the second indorser alone, at the request of the first indorser, one Grosvenor by name, under an agreement between Grosvenor and the plaintiff to guarantee to the plaintiff the payment of its expenses of this action, not to take advantage of any defence which might arise by reason of this action having been brought by it, and admitting his liability on the notes; that both indorsers are solvent and are inhabitants of the State of New York, as is the plaintiff; and that no effort has been made to collect the notes from Grosvenor as the first indorser. The defendant did not offer to prove that the plaintiff had received or held any collateral from Grosvenor or from the maker of the note, and admitted that there was no such collateral.

The presiding judge directed a verdict for the plaintiff, and the case is here on an exception taken to that ruling.

In support of his contention the defendant has made an argument based on the assumption that the relation between Grosvenor and the defendant, the first and second indorsers, is that of principal and surety, the defendant the second indorser being the surety. There is no pretence on the part of the defendant that he offered to prove that such was in fact the relation between this defendant and Grosvenor. Indeed the defendant in his brief states that in his answer the fact is alleged that "the defendant's indorsement, as between the defendant and Grosve-

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nor, the prior indorser, was for the accommodation of Grosvenor. That the plaintiff, knowing these facts, 'combined with said Grosvenor to bring this action against the defendant wholly in the interest and for the benefit of said Grosvenor, who is the sole and only party in interest in the prosecution thereof'," but it is not pretended in the brief that there was any offer to prove this allegation.

The case before us therefore is the ordinary case of two indorsers of a negotiable promissory note, each of whom is directly liable to the holder if the holder elects to demand payment from him; and where, if the holder elect to demand payment of the last indorser first, it becomes his duty to meet his obligation and his right, on doing so, to look to the prior indorser for repayment of the amount due on the note.

As between a first and second indorser the first indorser is ultimately liable for payment of the note, but he is not primarily liable for it as between himself and subsequent indorsers in the sense that as between a principal and surety the principal is primarily liable. It is not the duty of the first indorser, as between himself and a subsequent indorser, to pay in the first instance.

A prior indorser is entitled to the delay consequent on demand for payment being made in the first instance on a subsequent indorser. And he is at liberty to arrange with the holder to secure such delay by procuring such a demand. It is plain that such a delay was Grosvenor's sole object in the agreement he made with the plaintiff.

It is not necessary to consider whether the defendant is right in his contention that such an agreement as was made in the case at bar by Grosvenor is a defence when made by one primarily liable. That question did not arise in this case.

The entry must be

Exceptions overruled.

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MORRILL AND WHITON CONSTRUCTION COMPANY *vs.* CITY OF BOSTON.

Suffolk. March 14, 1904. — June 23, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Contract, Construction.

Where a contract in writing contains inconsistent provisions, a clause which requires something to be done to effect the general purpose of the contract is entitled to greater consideration than one which tends to defeat a full performance.

A contract for the erection of a municipal building for a round sum of money contained a specification for plastering, then after certain specifications about carpentry came a paragraph containing a provision requiring the contractor to furnish and do everything for the construction of the building "except the plastering and the parts of the heating and ventilating, and plumbing systems," and later came full specifications for plastering. *Held*, that the contractor was bound to do the plastering as part of the contract, the exception of the plastering being rejected as repugnant to the rest of the contract and inconsistent with its general purpose "to erect and complete a municipal building."

CONTRACT against the city of Boston with a count to recover $2,753.96 alleged to be due for extra materials and labor not included in the contract price named in a contract between the plaintiff and that city for the erection and completion of a municipal building at the corner of Columbia Road and Bird Street in Boston, for which it was alleged that by the terms of the contract the defendant was bound to pay, with a second count for work done and materials furnished and a third count on an account annexed, each for the same sum. Writ dated July 24, 1903.

In the Superior Court the case was presented upon an agreed statement of facts, it being agreed that if on the facts stated that court should find that the plastering was not a part of the work provided for in the contract, to be paid for by the round sum named in the contract, judgment was to be entered for the plaintiff in the sum of $2,690.92, with interest from July 21, 1903; otherwise, judgment was to be entered for the defendant.

The Superior Court gave judgment for the defendant; and the plaintiff appealed.

The material portions of the contract were headed:

"The following changes are made in the specifications of the work."

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After various specifications came the following:

"Section 6. Lathing, Plastering, etc.

"(1) Lathing.

"(a) Substitute first quality spruce laths for wire cloth or expanded metal on walls and ceilings, joints of lathing to be broken every 6 laths.

"(2) Plastering.

"(a) All ceilings to be plastered with 3 coat work, walls, etc., 2 coat work and otherwise as specified."

Here followed specifications headed "Section 7. Carpentry."

Then came the following:

"Section 2. Specific Work. (a) Erect and complete a Municipal Building and grade, complete, and fence the yard thereof upon a site at the northerly corner of Columbia Road and Bird Street, Ward 16, Boston, Mass., the Superintendent of Public Buildings to be the Officer to have charge of the work, and William H. Besarick, 15 School St., Boston, to be the Architect of the work; use temporary doors, screens, and sashes to close in the building; lay all water pipes, gas pipes, sewer and electric service from inside the walls of the building to and connect the same with the nearest street mains; furnish and do everything required therefor except the plastering and the parts of the heating and ventilating, and plumbing systems, but furnish and place all board supports, and furnish and do all cutting, fitting, filling, and board coverings required to place, and leave all said parts in proper position and finish," etc.

After various other specifications came the following:

"Section 6. Lathing, Plastering, Fireproofing, etc.

"(1) Lathing.

"(a) Lath the walls, ceilings and partitions throughout the 1st story, the janitor's room in basement and the central and northeast end staircase hall throughout each story, including the basement, also the ceilings, walls and partitions of rooms for Instructor, Physician and bath in second story using No. 19 stiffened wire cloth or an expanded metal lath of satisfactory pattern. Partitions to be lathed on both sides in all cases.

"(2) Plastering.

"(a) Plaster the above lathed work with a thorough coat of lime and sand and long cattle hair mortar in proper proportions

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to make first class stock. All plastering is to be scratched and when thoroughly dry to have a coat of browning, hand floated to an even surface. Skim all of the foregoing plastered work with a coat of clean sharp sand and lime leaving all angles and surfaces true and straight.

"(b) Run ornamental stucco cornices in all rooms in 1st story including the main entrance hall, and vestibule in accordance with the detail drawings also run moulded and ornamental stucco centres in all 1st story rooms where directed.

"(c) Fill in flush with mortar between the grounds from floor to ceiling of 1st story on all brick partition walls, also provide fire stops of mortar, 8 in. high, between the grounds at floor and ceiling on all outside walls.

"(d) The plasterer is to provide wire lathing and plaster all weight bearing metal.

"(e) The cast iron supporting columns on the inside are to be wire lathed and plastered with Keene's cement to make a neat and substantial finish. Those in the Library and Recreation Room to have stucco or papier mache capitals and moulded base as per details.

"(f) Fireproof between the stringers every 8 ft. the central and northeast staircases throughout.

"(g) Do all patching, leaving the entire work clean and whole upon completion and remove from the premises all rubbish.

"(h) All of the foregoing work is to be done by 1st class workmen in the best manner and in accordance with the requirements of the Building Law and to the satisfaction of the Architect."

G. M. Reed, for the plaintiff.

A. L. Spring, for the defendant.

BRALEY, J. Under the building contract entered into between the parties, as the plaintiff went forward in the performance of its part of the undertaking, a dispute arose whether by the terms of the agreement it was required to plaster the building, and an arrangement was then effected by which it was done, with the provision that whether the plaintiff was entitled to extra compensation, or must be content to accept the round sum specified in the contract, was a question that should be left open for determination in the suit now before us.

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Its solution depends on the construction of the contract, and if the intention of the parties can be ascertained it must control, and for that purpose the whole contract is to be considered rather than an inquiry that is limited to the part relied on by the plaintiff to support its contention.

For this purpose the order in which the various clauses and divisions are arranged furnishes little aid, for the modifications made in that part called specifications of the contract precede section two, which contains the phrase "furnish and do everything required therefor except the plastering and the parts of the heating and ventilating, and plumbing systems", on which the plaintiff relies for exemption and relief, and these changes contain a specific requirement for the plastering of the ceilings and the walls with a designated number of coats, or otherwise as called for, while section six to which this change refers follows section two, and the original specification with its modification are each classed under the general description of lathing and plastering.

If the language of either section had contained the only reference to the subject no difficulty would arise, but both being in the same agreement they are inconsistent, and cannot be reconciled, yet it does not follow that the plaintiff can recover.

The main object to be accomplished is stated in section two which requires the plaintiff to "erect and complete a municipal building", and the careful details provided for the kind and quality of the materials to be used, including those for which this suit is brought, makes it reasonable to suppose that these specifications would not have been originally inserted, and subsequently modified in paragraphs preceding and following the excepting clause, and hence more nearly expressing the final determination of the parties, unless in conformity to such a general design, for where in a contract like this a repugnancy is found between clauses, the one which essentially requires something to be done to effect the general purpose of the contract itself is entitled to greater consideration than the other which tends to defeat a full performance, and repugnant words may be rejected in favor of a construction which makes effectual the evident purpose of the entire instrument. *Fowle* v. *Bigelow*, 10 Mass. 379. *Wade* v. *Howard*, 6 Pick. 492, 499. *Heywood* v.

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Perrin, 10 Pick. 228. *Folsom* v. *McDonough*, 6 Cush. 208. *Smith* v. *Davenport*, 34 Maine, 520.

Under the construction for which the plaintiff contends a very substantial part of the contract must be nullified, and less violence is done if the general words on which it relies are made to yield to the specifications already sufficiently discussed, moreover, the plaintiff having sued for labor and materials must sustain the burden of proof that both were furnished under a contract that required the defendant to pay for them, but it failed to maintain this issue of fact before the tribunal whose finding thereon is final, and as no error of law appears, the judgment of the Superior Court is affirmed.

Judgment affirmed.

JOHN T. PARSONS *vs.* HECLA IRON WORKS.

Suffolk. March 14, 1904. — June 23, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Negligence, Res ipsa loquitur, Injuries to employee of another from fall of staging.

In an action by an employee of a corporation engaged in putting elevator cars into certain elevator wells against another corporation engaged at the same time in putting iron panels on the outside of the wells, for injuries caused by a temporary staging constructed by the servants of the defendant falling on the plaintiff as he stepped out of one of the elevator wells in the course of his work while the servants of the defendant were engaged in shifting the staging from one place to another, it appeared, that the fall of the staging was caused by a certain upright having been moved out and certain braces knocked away, but it did not appear whether this was done by the plaintiff or a fellow workman of the plaintiff employed by the same corporation or whether it was done by the servants of the defendant or by some third person. Everybody concerned denied having done it. *Held*, that, the cause of the fall of the staging having been shown, the doctrine of *res ipsa loquitur* did not apply; *also*, that it was right to instruct the jury that the defendant was bound to exercise due care in shifting the staging, including the discovery of its condition; *also*, that it was right to instruct the jury, that if they found that the upright was moved out and the braces knocked away by the plaintiff's fellow servant they must be satisfied, in order to find the defendant liable, that the defendant's employees would have learned the condition of the upright if they had exercised due care and also that they were negligent in handling the staging as they did knowing that the braces were gone.

TORT by an employee of the Whittier Machine Company for injuries from the falling upon him of a staging used by the

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employees of the Hecla Iron Works through the alleged negligence of the servants of that corporation. Writ dated April 17, 1900.

In the Superior Court the case was tried before *Fessenden*, J., who ruled as stated in the opinion. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

W. H. Brown, (*J. W. Converse* with him,) for the plaintiff.

W. I. Badger, (*W. H. Hitchcock* with him,) for the defendant.

LORING, J. This is an action to recover compensation for injuries caused by a staging falling on the plaintiff. The plaintiff was employed by the Whittier Machine Company, and the staging was erected by the defendant the Hecla Iron Works. Both the Whittier Machine Company and the Hecla Iron Works were at work in the construction of a building which was in process of erection, the Whittier Machine Company putting elevator cars in three elevator wells and the defendant iron works (among other work) putting iron panels on the outside of the same three elevator wells.

To enable their men to put on the face of the elevator wells the plates near the ceiling of the story in question, the defendant erected a staging consisting of planks laid loose on three horses and extending across well No. 1 and well No. 2, the third horse being just beyond the division between well No. 2 and well No. 3.

The plaintiff introduced evidence that on the morning of February 23 he and one Martin (also employed by the Whittier Company) were at work putting in the car in well No. 3; that in the course of this work they had occasion to go in and out of the well; that just as the plaintiff stepped out or just after he had stepped out of the well in the course of his work, this staging fell on him without warning; that there was a man and a box of tools on the staging at the time when it fell, and that the third horse, which was opposite to well No. 3, was about a foot away from the face of the elevator on that morning, that is to say, this horse was at right angles to the face of the well and the end of the horse next the face of the well was a foot away from the face of it; and also that the accident happened about two hours after the plaintiff went to work that morning.

It is stated in the bill of exceptions that the staging was ad-

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mitted to have been entirely firm when it was originally put up, and that it was constructed as follows: Each horse consisted of two uprights and two cross pieces, the cross pieces being nailed across from upright to upright, at the top and bottom. Each upright was made firm "by braces running from the top of the horses at an angle to the ground. Where the braces touched the floor they were secured by cleats nailed to the floor and by nails. Upon the top of these horses there were placed rough spruce planks eight to ten inches wide and twelve to fourteen feet in length. These planks were not nailed to the horses."

Martin testified on cross-examination that he did not move back the upright opposite to well No. 2, where he and the plaintiff were working on February 21, the last day on which he and the plaintiff worked before the day of the accident, the intervening day, February 22, being a holiday.

The defendant introduced evidence that the first section of the staging, which, up to the morning of February 23, had been in front of elevator well No. 1, was being shifted over in front of well No. 3, by two of the defendant's employees, Young and Carpenter. For that purpose Young got on to the second section of the staging and Carpenter was engaged in pushing the planks, which rested on the first two horses and made the first section, on to the second and third horses. He had pushed two of the planks on to the second section and was pushing the third over when the two uprights making the second section fell and caused the injury here complained of. That the reason for the uprights falling over was that "the braces" had been "knocked off" the "staging," and the upright opposite the second elevator well, which was originally built close up to the face of the well, had been moved out by some one other than the defendant's employees. That warning was given by Young, who called to look out when he went on the staging to assist in making the shift.

1. The first ruling requested was this: "If the defendant's staging fell, in the absence of an explanation of the fall, such fall is *prima facie* evidence of the negligence on the part of the defendant, and the plaintiff is not obliged to point out the particular cause of the fall of the staging in order to prove the defendant's negligence." This was rightly refused. The cause of

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the fall of the staging was shown by the defendant and does not seem to have been in dispute. Under these circumstances the rule of *res ipsa loquitur* is not applicable. See in this connection *Gibson* v. *International Trust Co.* 177 Mass. 100; *Buckland* v. *New York, New Haven, & Hartford Railroad*, 181 Mass. 3.

2. The second ruling requested was: "The defendant was negligent if there was any weakness or defect in the staging in question in this case which could have been discovered by careful inspection." The jury were told that the defendant was bound to exercise due care in shifting the staging, including the discovery of its condition by reason of its having been moved back from where it was originally placed. That was a more accurate statement of the defendant's liability than the statement contained in this ruling.

3. The third ruling requested was: "If some third person had removed the braces of the staging in question and weakened it, such act does not relieve the defendant's responsibility if such weakening could have been discovered by a careful inspection." The plaintiff complains of the following portion of the charge on this point: "Now there is another matter where the parties are at issue. The plaintiff says he did not move it. The defendant says it did not move it, and the defendant says there is no evidence in the case to show that it did move it and no evidence from any one, any witness, who saw the defendant or any of its workmen move it. The plaintiff says he did not move the staging and the defendant says that either he or Martin did move the staging. The plaintiff says he did not, the defendant says it did not, and that there was a motive for the plaintiff to move it because they could get at their work and do their work more easily, more handily, if it was moved. There are the suggestions. What difference does it make whether the plaintiff moved it or not? The difference is this, if the plaintiff moved the staging, if the plaintiff was engaged with Martin in moving the staging, or if Martin moved the staging, then the defendant says that that was not its carelessness, that it did not bring about the injury; that if the plaintiff moved it he brought the trouble upon himself, or that if Martin did it he brought the trouble upon the plaintiff, and that it was not the defendant's doing.

"The plaintiff says he did not move it, but even if he did,

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even if Martin did, still the defendant ought not to have used it, and that it was in consequence of the use of it when it was in its dangerous condition, as the plaintiff claims, that this injury was brought about. In other words, the plaintiff says that it was careless in the defendant to use it after he or Martin moved it. But the defendant says in reply to that, you ought not to find it was careless — it being a question of fact and not of law — you ought not to find it was careless for it to use the staging which the plaintiff had moved and Martin had moved; that the one who was responsible for this, if any one, was the one who moved the staging; and the defendant says it is a violent misconstruction of the facts to say that you ought to hold the defendant careless and the plaintiff free from carelessness under such circumstances. These matters are left for your consideration."

But this cannot be taken to have been the whole of the charge on this point. The presiding judge had previously told the jury that the only thing complained of by the plaintiff was the defendant's use of the staging, and to hold it liable the plaintiff must prove that it had not exercised reasonable care in the use of the staging and that the accident was caused by its failure to exercise reasonable care in the use of it. "The plaintiff says that it [the staging] was not used properly, that reasonable care was not exercised with reference to the use of it; that a change was made and in the course of that change the defendant was not reasonably careful, and that the staging collapsed and some planks fell and struck the plaintiff and he was injured and that the defendant was not careful about it. It is suggested that that staging was moved away, a portion of it, from the elevator well and that it was not in fit condition to be used, and that the defendant, if it had used proper care with reference to that ought to have discovered it either by inspection or oversight. Did the defendant fail to use reasonable care with reference to it? What was the situation? You can understand that if the defendant had moved the staging back, as the plaintiff argues, itself, and had proceeded to use it moved it away from the well and proceeded to use it, gave no warning to others who were at work about there, having reasonable cause, if that was the case, to know that the use of it would be likely to be

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attended with danger, you can see, gentlemen, the force of the argument that that would not be reasonable care. It will be for you to determine. The plaintiff says that that was the fact. Whether the defendant moved it back or not, the plaintiff goes further and says if some outsider moved it back, still the defendant ought to have exercised care with reference to that staging to see that it was reasonably safe, considering all the uses to which it was to be put."

We are of opinion that the part of the charge complained of, taken in connection with what had been told them before as to the necessity of proving that the defendant was lacking in the exercise of due care, must have been understood by the jury to mean that, in case they found that the upright was moved out and the braces knocked away by Martin, they must be satisfied, in order to find the defendant liable, that the defendant's employees would have learned of the condition of the upright, if they had exercised due care, and were negligent in handling the staging as they did, knowing that the braces were gone; and that to render the defendant liable in this contingency both these propositions must be made out.

Exceptions overruled.

JOHN R. GRAHAM & others, trustees, *vs.* HATCH STORAGE BATTERY COMPANY.

Norfolk. March 15, 1904. — June 23, 1904.

Present: KNOWLTON, C. J., LATHROP, HAMMOND, LORING, & BRALEY, JJ.

Sale, Acceptance. *Contract*, Performance and breach. *Waiver*. *Evidence*, Materiality.

One who receives an electrical storage battery manufactured for him under a contract in writing on which he has made several payments, and finding it not to be in accordance with the contract seasonably notifies the manufacturer of his rejection of the battery, but thereafter continues to use it in his business for several months and until he is enjoined from doing so in a suit by a third party, has lost his right to reject the battery and recover the money he has paid on account of it, his only remedy being an action for damages for breach of contract.

In an action to recover money paid under a contract for the purchase of an electrical storage battery on the ground that the battery is not in accordance with

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the contract, in which the defendant prevails on the ground that the plaintiff has lost his right to reject the battery by continued use of it after notifying the defendant of his refusal to accept it, the exclusion of evidence, that the battery furnished by the defendant is an infringement of a patent held by another person, gives no ground for exception, this evidence being material only on the question of damages for breach of contract which is not the issue.

CONTRACT, with five counts, as stated in the first paragraph of the opinion. Writ dated April 27, 1899.

In the Superior Court *Bell*, J. ordered a verdict for the defendant, making the rulings stated in the opinion, and by consent of the parties reported the case for determination by this court. If there was no error in the rulings judgment was to be entered on the verdict. If the verdict was ordered for the defendant improperly, but there was no error in rulings as to the admission or exclusion of evidence or in refusing requests for rulings of law, if the findings of the jury warranted it judgment was to be entered for the plaintiffs on the fourth count in the sum of $1,800 with interest from the date of the writ. If the verdict was ordered improperly, and there was error as to the admission or exclusion of evidence or in the refusal of rulings requested, a new trial was to be granted on all issues to which such errors applied.

Z. S. Arnold, for the plaintiffs.

A. M. Lyman, (*E. D. Chadwick* with him,) for the defendant.

HAMMOND, J. On September 29, 1898, the plaintiffs and the defendant entered into a written contract by the terms of which the defendant was to manufacture, set up and put in practical operation at the power plant of the plaintiffs, an electrical storage battery having a capacity of seven hundred ampere hours, for which the plaintiffs were to pay $2,195. In order to put the battery in condition for practical operation, it was necessary that, after the parts were "assembled" and put up, an initial charge of electricity, continuing for about one hundred hours, should be given, to change the chemical nature of a certain kind of lead used in its construction. The battery was to be delivered to the plaintiffs on or before November 19, 1898. Before the delivery the plaintiffs had made three payments of $500 each on the contract, and upon December 20, 1898, there was an additional payment of $300. The plaintiffs being dissatisfied with the battery brought this action, the writ being dated April 27, 1899:

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The declaration contains five counts, of which the first three are for damages for the failure of the defendant fully to comply with the terms of the contract, the fourth is to recover $1,800 money had and received by the defendant to the plaintiffs' use, and the fifth is to recover damages for false and fraudulent representations as to the capacity of the battery.

The trial occupied between five and six days. Upon the third day, after the plaintiffs' evidence was in and while the defendant's evidence was going in, the plaintiffs contended that they properly had rejected the battery and stated that they should rely only upon the fourth count; and in accordance with this statement the trial proceeded, and the case was submitted to the jury, on that count alone.

The main issues were whether the battery was of the capacity called for by the contract, whether the initial charge was given properly, and if not, who was at fault, and whether the battery had been accepted by the plaintiffs. Numerous requests for instructions were presented by the defendant, some of which were given and some refused. Twelve separate and distinct questions were presented to the jury. By their answers to the first eleven it appears that they found in substance that the battery was not of the capacity called for by the contract, and would not have been even if the initial charge had been given properly; that they were in doubt whether this charge had been given properly, but, even if it had not, "it was the fault of the defendant," and that the plaintiffs never accepted the battery but rejected it within a reasonable time, to wit, in January, 1899. So far the answers were favorable to the plaintiffs. But to the twelfth question, namely, "Until what time did the plaintiffs use the battery?" the jury answered "Until May, 1899." This answer was in accordance with the undisputed facts, for it was unquestioned that the plaintiffs had used the battery from the time it had received its initial charge in November, 1898, until May 29, 1899, and that they stopped then only because an injunction was served on them by process from the "United States Court" in a suit brought not by the defendant but by a rival corporation, on the ground of infringement of certain letters patent.

In this state of things the plaintiffs requested the judge to

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direct a verdict in their favor upon the fourth count, for the sum paid as above stated by them and interest, but the judge declined so to do, and ruled that because of the issue of fact found by the jury in their answer to the twelfth question the plaintiffs could not recover; and directed a verdict for the defendant.

Certain exceptions to rulings upon evidence were taken by the respective parties. The defendant further excepted to the refusal of the judge to give some of the rulings requested and to certain portions of the charge to the jury, and the plaintiffs excepted to the refusal of the judge to direct a verdict for the plaintiffs as requested, and to the order directing a verdict for the defendant. The case is before us upon a report made by the judge, by the terms of which these various exceptions are before us.

Although the findings of the jury were sufficient to show that the plaintiffs had a valid claim for damages for the failure of the defendant fully to perform the contract, yet it must be borne in mind that the plaintiffs had abandoned the counts framed for that purpose and had elected to proceed upon the ground that they had rejected the battery for good cause and therefore were entitled to recover back the money which they had paid. At first sight there seems to be an inconsistency between the findings of the jury on the one hand that the plaintiffs never accepted the battery but seasonably rejected it, and the finding on the other that after the rejection they used it for several months, but upon a careful reading of the record we think that the inconsistency is more apparent than real. In view of the evidence and of the general course of the trial, we think that it was the purpose of the judge to submit to the jury the questions whether there was any express acceptance or any express rejection of the battery; and that upon these questions they were not to take into consideration the legal effect of a subsequent use; that the jury so understood it, and that their findings are to be interpreted accordingly. So interpreted, the findings must be taken to mean that there never was any express acceptance, but there was a seasonable, express rejection, followed by a use of the battery for several months; and, as thus read, they are not inconsistent with each other. It is apparent that this is the view which the presiding judge took of them.

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The case then is this. The battery was not in accordance with the contract, and the plaintiffs seasonably rejected it. But after that they kept it and used it continuously for several months, for their own profit, in the very work for which they bought it. Is this subsequent use fatal to their right to rely upon their rejection and to recover back what they had paid of the purchase price? The judge ruled that it was, and we are of opinion that the ruling was correct.

The battery was constructed and delivered to the plaintiffs by the defendant in professed compliance with the contract, and both parties so understood. When the plaintiffs discovered that the battery was not in accordance with the contract, three remedies were open to them. The first was to reject and give notice of their decision to the defendant. This they seasonably did, and, if they had adhered to their rejection, they could have recovered back what they had paid. If upon such notice the defendant did not remove the battery, then the plaintiffs might have removed and stored it subject to the risk of the defendant, or held the defendant for storage if not removed. The second remedy was to accept the machinery and bring an action on the contract for damages. The third remedy was, whenever they should be sued for the balance of the purchase money, to set up a counterclaim for damages for breach of contract. They began with the first and rejected the battery. When they rejected it they became subject to the general rule that he who seeks to reject an article as not in accordance with the contract must, after he discovers its true condition, do nothing inconsistent with the vendor's ownership of the property. See *Brown* v. *Foster*, 108 N.Y. 387, 390. If the plaintiffs simply had allowed the battery to remain in their possession subject to the defendant's order, they nevertheless could have relied upon their rejection. But they did more. For several months after rejecting it they used it for their own profit and convenience in the work for which it was constructed and delivered to them under the contract. As between the parties to the contract such a use is not to be regarded as tortious but only as founded upon rights given by the contract. It is utterly inconsistent with a purpose to resort to the remedy of rejection, and is consistent only with a claim to title and ownership; and consequently it must be held as an

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abandonment of the right of rejection. The verdict for the defendant therefore was properly directed. For cases illustrating the principle here applied, see *Brown* v. *Foster*, 108 N. Y. 387, 390; *Underwood* v. *Wolf*, 131 Ill. 425; *Dodsworth* v. *Hercules Iron Works*, 13 C. C. A. 552; *Pennsylvania Iron Works Co.* v. *Hygeian Ice & Cold Storage Co.* 185 Mass. 366.

It follows from the terms of the reservation that the verdict is to stand "if there was no error in the admission or exclusion of evidence against the exception of the plaintiffs." The only exception taken by the plaintiffs as to rulings upon the admissibility of evidence was to the exclusion of the offer to prove that the battery furnished by the defendant was an infringement of a patent held by another corporation. Even if there was an implied warranty of the right to use the battery as well as of title, (see *Bigler* v. *Electro-Dynamic Co.* 56 Fed. Rep. 304; 21 C. C. A. 12,) still the evidence would have been material only on the question of damages for breach of the contract; and in view of the fact that the case finally was submitted to the jury on the fourth count, which did not sound in damages, and of the findings of the jury, it does not appear that any material error was committed in its exclusion.

It becomes unnecessary to consider the exceptions of the defendant. In accordance with the terms of the report, the order must be

Verdict for the defendant to stand.

COMMONWEALTH *vs.* WONG CHUNG & another.

Suffolk. May 19, 1904. — June 23, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Deserter. Jury and Jurors. Practice, Criminal, New trial.

U. S. St. 1865, c. 79, § 21, depriving a deserter from the United States army of his rights as a citizen of the United States applies only to persons legally adjudged guilty of desertion by a competent tribunal, and the fact that a person is recorded as a deserter in the office of the adjutant general of this Commonwealth does not subject him to the penalties of the crime of desertion under that statute, even if it is admitted that this entry in the record is true.

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Whether the penalty imposed by U. S. St. 1865, c. 79, § 21, on a person found guilty of desertion from the army of the United States, depriving him of his rights as a citizen of the United States, deprives him also of a previously existing right as a citizen of this Commonwealth to vote for members of the General Court, and thus disqualifies him as a juror, *quære*.

Under the laws of this Commonwealth one who at some previous time has been convicted of felony can be placed on the jury list as a person of good moral character, although under R. L. c. 176, § 5, his name may be removed by the revisory board in their discretion, unless he has been pardoned on the ground of innocence.

The granting of a new trial in a criminal case on account of the disability of a juror which was not known to the defendant until after his conviction is within the discretion of the presiding judge.

INDICTMENT for murder in the second degree returned by the grand jury in the Superior Court for the county of Suffolk on November 2, 1903.

At the trial in the Superior Court before *White*, J., a verdict of guilty of murder in the second degree was returned against the defendants Wong Chung and Charlie Chin, a third defendant who had been indicted with them not having been apprehended.

Thereafter the defendants filed a motion for a new trial on account of the alleged disqualification of one of the jurors, and requested certain rulings of law. The judge refused to make the rulings requested and denied the motion. The defendants alleged exceptions, raising the questions stated in the opinion.

F. Paul, for the defendants.

J. D. McLaughlin, Second Assistant District Attorney, for the Commonwealth.

KNOWLTON, C. J. The defendants, after a conviction of murder in the second degree, filed a motion for a new trial on account of the alleged disqualification of one of the jurors. It appeared at the hearing that the juror enlisted in the army of the United States in the War of the Rebellion, and that the record in the office of the adjutant general of the Commonwealth shows him marked as a deserter in the year 1862. It was admitted, at the hearing on the motion, that this entry in the record is true. It was also shown that on June 22, 1868, he was convicted of breaking and entering a shop and stealing goods therein, and was sentenced to imprisonment in the State prison for the term of three years. On July 30, 1870, he was released from imprisonment under this sentence, by the Governor with

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the advice and consent of the Council, on condition that if he should be convicted of any crime punishable by imprisonment, before the expiration of the sentence, he should serve the remainder thereof.

The defendants contend that he was disqualified to serve as a juror because of his desertion, which under the U. S. St. 1865, c. 79, § 21, deprived him of his rights as a citizen of the United States and rendered him incapable of holding any office of trust or profit under the United States. They contend, under the R. L. c. 176, § 1, that only persons qualified to vote for representatives of the General Court can serve as jurors, and that under article 3 of the amendments to the Constitution of Massachusetts, none but citizens of Massachusetts can vote for members of the General Court, and that, having lost his rights as a citizen of the United States, he cannot exercise the rights of an elector as a citizen of Massachusetts. See *Opinion of the Justices*, 122 Mass. 594. R. L. c. 1, § 1.

We are of opinion that the last part of this contention is not well founded. In the first place, the statute depriving one of his rights of citizenship under the government of the United States does not take effect upon any person until he has been legally adjudged guilty of desertion by a competent tribunal. This is a highly penal statute, and it would be dangerous to attempt to give it effect otherwise than upon sufficient proof, in a proceeding regularly inaugurated and properly conducted to ascertain the facts. It has often happened that a soldier has been entered on the rolls as a deserter, when there was no real desertion. The disqualification under the statute first arises when the soldier is tried and found guilty of desertion. This is the doctrine stated in *State* v. *Symonds*, 57 Maine, 148. The admission which was made at the hearing upon the motion for a new trial, if competent, should be considered only upon the question of the juror's character and his fitness to serve in a trial. In regard to the circumstances of the desertion, whether it was entirely without excuse or with palliating conditions, nothing appears. In the exercise of his discretion in passing upon the motion, the judge would give the admitted facts such effect as they ought to have.

We do not find it necessary to decide whether, if the juror

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had been found guilty of desertion, his loss of his rights as a citizen of the United States would have deprived him of his previously existing right as a citizen of Massachusetts to vote for members of the General Court. It is at least doubtful whether this result would have followed. The failure of the defendants to object to the juror until after the verdict, will be considered in connection with the other branch of the case.

The defendants also contend that the juror's conviction of a felony nearly thirty-six years before the trial of their case, is a disqualification which entitles them to a new trial as a matter of law. At common law this would be a disqualification, even after the lapse of so long a time. 3 Bl. Com. 363. 4 Bl. Com. 349, 350, 352. 5 Bac. Abr. 347. In this Commonwealth the qualifications of jurors are prescribed by statutes which cover the whole subject and supersede the common law. "A person qualified to vote for representatives to the General Court shall be liable to serve as a juror, except that the following persons shall be exempt." Following this statement in the R. L. c. 176, § 1, is a long list of public officers and others, who are exempt from service. The provisions for the preparation and publication of the list of jurors in cities and towns are found in §§ 4, 5, 6, 7, 8 and 9 of this chapter. In Boston this list is to be prepared by the board of election commissioners, in other cities by the registers of voters, and in towns by the selectmen. This list is to contain the names "of such inhabitants of the city or town, of good moral character, of sound judgment and free from all legal exceptions, not absolutely exempt from jury service, as they think qualified to serve as jurors." First, the members of the board must use their judgment in determining what persons possess the statutory qualifications. In considering the qualifications of a person who has been convicted of a crime, that fact naturally would be deemed important on the question whether he is of good moral character. But in this Commonwealth it is not the law that persons convicted of crime shall be permanently deprived of their civil rights. Our legislation, more humane and charitable than the law of early times, recognizes the possibility of repentance and reformation. A person convicted of a crime, however heinous, is not incompetent to testify in court, although the fact may be shown to affect his credibility.

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R. L. c. 175, §§ 20, 21. Outlawry and attainder are no parts of our system. Unless by special provision of statute in a particular case, conviction of crime does not disqualify one from holding office or exercising other civil rights after he has suffered punishment, if he is trustworthy and possessed of the other necessary qualifications. Returning to this statute, there is nothing to prevent the board from putting upon the jury list the name of a former criminal, if they find him to be of good moral character and otherwise suitable. When the list is complete it is posted for ten days, and submitted for revision and acceptance to the board of aldermen in cities, or the single legislative board if there is one, and to the voters in town meetings in towns. The statute recognizes the fact that the list may contain the names of persons who previously had been convicted of crime, in the provision in § 5 that the revisory board may remove therefrom the names of such persons, unless they have been pardoned on the ground of innocence of such crime. This allows, but does not require, a previous conviction of crime to be made a reason for the removal of a name, even if the person has afterwards lived for forty years without reproach, and is of good moral character.

Section 8 provides differently for a different condition, as follows: "If a person whose name has been so placed in the jury box is convicted of a scandalous crime or is guilty of gross immorality, his name shall be withdrawn therefrom by the board of selectmen and he shall not be returned to serve as a juror." This relates to the case of one who is shown, by the facts stated, not to be of good moral character, after his name has been placed in the jury box. In such a case the name must be removed, while in the case of a person who had been convicted before the list was made up and who was put upon the list presumably because he was thought to be of good moral character, the name may be removed or not, at the option of the revisory board, unless he is pardoned on the ground of his innocence. We think these statutes make it plain that one who is found to be of good moral character by the board that prepares the list, and whose name is not removed under the authority of the statute by the revisory board, is not disqualified from serving as a juror merely because, at some time, perhaps many years before, he had been convicted of a felony.

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But if the facts shown in this case would have been a ground of challenge for cause, the defendants were not entitled as matter of law to have the verdict set aside. The judge found that they did not know the facts until after the trial; but even in such a case the motion subsequently made is addressed only to the discretion of the court. On this subject there is considerable conflict in the decisions, but the great weight of authority is in favor of the proposition just stated. The matter was carefully considered by Chief Justice Gray in *Wassum* v. *Feeney*, 121 Mass. 98. There was a motion for a new trial because one of the jurors was an infant only nineteen years of age. In the opinion it is said that "When a party has had an opportunity of challenge, no disqualification of a juror entitles him to a new trial after verdict." A long extract from the opinion in this case is quoted with approval by Chief Justice Fuller in *Kohl* v. *Lehlback*, 160 U. S. 293, who states the rule in a similar way, the juror in that case being an alien. Other cases of similar import are *Ryan* v. *Riverside & Oswego Mills*, 15 R. I. 436; *State* v. *Cosgrove*, 16 R. I. 411; *State* v. *Jackson*, 27 Kans. 581; *Presbury* v. *Commonwealth*, 9 Dana, (Ky.) 203; *Busey* v. *State*, 85 Md. 115; *George* v. *State*, 39 Miss. 570; *Williams* v. *State*, 37 Miss. 407, 409; *Frank* v. *State*, 39 Miss. 705; *Croy* v. *State*, 32 Ind. 384; *Chase* v. *People*, 40 Ill. 352; *State* v. *Davis*, 80 N. C. 412; *M'Clure* v. *State*, 1 Yerg. 206; *Rockwell* v. *Elderkin*, 19 Wis. 367; *Bonneville* v. *State*, 53 Wis. 680; *Hollingsworth* v. *Duane*, 4 Dall. 353; *State* v. *Williams*, 38 La. Ann. 361; *State* v. *Powers*, 10 Ore. 145. See *Smith* v. *Earle*, 118 Mass. 531; *Daniels* v. *Lowell*, 139 Mass. 56; *Jeffries* v. *Randall*, 14 Mass. 205. In several of the States there are cases which rest upon a different view, which are not in conformity with the decisions of this court. In New Jersey, Virginia, West Virginia, Arkansas and perhaps some other States, the doctrine has been embodied in a statute, providing in substance that no exception against a juror on account of any legal disability shall be allowed after he is sworn. *Kohl* v. *Lehlback*, 160 U. S. 293. *Commonwealth* v. *Jones*, 1 Leigh, 598. *State* v. *McDonald*, 9 W. Va. 456. *Collier* v. *State*, 20 Ark. 36. *Casat* v. *State*, 40 Ark. 511.

The defendants contend that this case should not be governed by the general rule stated above, because, in an examination on

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the *voir dire*, a juror cannot be asked questions whose answers might tend to his infamy or disgrace. None of the cases above cited refer to this limitation on the right to examine, as a reason for making an exception to the rule. In three of them, *Busey* v. *State*, 85 Md. 115, *State* v. *Williams*, 38 La. Ann. 361, *State* v. *Powers*, 10 Ore. 145, the alleged disqualification of the juror was his previous conviction of a crime. It is true that in many cases the opportunity of the parties to investigate facts and ascertain the qualifications of jurors, is stated as one of the important reasons of the rule, and the opportunity to examine on the *voir dire* is often a convenient method of investigation. But it is not the only method. Revised Laws, c. 176, § 9, provide that, to any person indicted for a crime punishable with death or imprisonment for life, a list of the jurors who have been returned must be furnished at the expense of the Commonwealth.

In this and other ways, interested parties have opportunities to know who are to serve as jurors, and to make inquiry in regard to their qualifications. In many cases the failure of a party to ascertain a disqualification before the verdict is treated as a waiver of his rights in this respect. In particular cases this view is often correct and sufficient. But we are of opinion that the rule rests upon a foundation that is broader. While the duty of ascertaining that the persons drawn as jurors are properly qualified rests primarily upon the Commonwealth through its designated officers, the parties to trials in court have an interest in the same subject, and upon them rests a responsibility for the proper protection of their own rights. It is expected that they will consider somewhat the qualifications of those who are to sit in judgment in their causes. Our system provides for challenges by the parties, both in civil and criminal cases, which may be peremptory as well as for cause. If, notwithstanding the efforts of public officers to perform their duties, and such efforts as the parties choose to make for the protection of their rights in regard to qualifications of jurors, it is discovered after a verdict that a disqualified person has joined in the decision, the interests of justice require that the irregularity or accident shall be treated like other irregularities. The responsibility for it should be treated as resting in part upon the parties, while primarily it is upon the public authorities. If in

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the opinion of the presiding judge, the disqualification of a juror has operated injuriously, and has tended to the return of an erroneous verdict, or has otherwise worked injustice, a new trial should be granted. A motion for a new trial for such a cause, like motions for new trials generally, should be addressed to the discretion of the court. It would be most unfortunate if, for an accidental error or omission hardly more than technical, it should be necessary to set aside a correct verdict on the motion of the defeated party, and to deprive the other of his rights obtained at great cost, and to expose him to the risks which attend postponement.

We are of opinion that the ruling was right.

Exceptions overruled.

GEORGE C. OSGOOD & another, trustees, *vs.* JOHN Z. ROGERS & others.

Middlesex. December 8, 9, 1903. — June 24, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Charity, What constitutes, Administration *cy pres*. *Trust*. *Devise and Legacy*. *Joint Tenants and Tenants in Common*.

A gift to the pastor and deacons of a church and their successors forever for the support of the church in its religious worship creates a public charitable trust.

A will contained the following provision: "At the death of my said Sisters and Brother I do give bequeath and devise all my interest in my said real Estate in two parts to the Pastor & Deacons of High Street Church and to the Pastor and Deacons of John Street Church to be by them disposed of for the support the said churches in their religious worship to be equally divided between the said churches — by creating a permanent fund, the interest and income of which whether in the improvement of the said lands or converting the same into funded securities yielding interest thereon — to the said Pastor & Deacons of High St. Church & to the said Pastor & Deacons of John St. Church and their successors forever — the division & enjoyment thereof to be in peace and harmony between the said churches." After administering one half of the fund for a time, the John Street church ceased to exist and the society voted to discontinue religious worship and to make proper disposition of their funds and other property. The High Street church originally was established by the aid and co-operation of the John Street church, and many former members and attendants of the John Street church attended worship there. The two churches were of the same religious denomination. *Held*, that the bequest was to the respective pastors and deacons of the two churches as tenants in common and not as joint tenants; that

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each gift was a public charity; and that the administration of the fund given to the pastor and deacons of the John Street church having become impracticable in the precise manner provided by its creator, the fund should be applied *cy pres* by paying it to the pastor and deacons of the High Street church to be administered by them for the support of religious worship in that church as nearly as might be in the manner in which the testator directed that it should be used for religious worship in the John Street church.

Although it is usual in applying a charitable fund *cy pres* to refer the matter to a master to report a scheme this court may frame a scheme directly or adopt one that is proposed.

MORTON, J. This is a bill in equity by the deacons of the John Street church of Lowell praying to be instructed as to the disposition of a fund alleged to be held by them as trustees under and by virtue of the second clause of the will of Benjamin P. Rogers. The case was reserved for the full court by a single justice upon the bill and answers. The clause is as follows: "2. At the death of my said Sisters and Brother I do give bequeath and devise all my interest in my said real Estate in two parts to the Pastor & Deacons of High Street Church and to the Pastor and Deacons of John Street Church to be by them disposed of for the support the said churches in their religious worship to be equally divided between the said churches — by creating a permanent fund, the interest and income of which whether in the improvement of the said lands or converting the same into funded securities yielding interest thereon — to the said Pastor & Deacons of High St. Church & to the said Pastor & Deacons of John St. Church and their successors forever — the division & enjoyment thereof to be in peace and harmony between the said churches." By a previous clause the testator gave to his brother and sisters a life interest, coupled with a power of sale, in his real estate. After the death of the testator, the pastors and deacons of the two churches joined in conveying their interest in the real estate to the life tenants in consideration of $6,000, one half of which was paid to the pastor and deacons of the John Street church, and the other half to the pastor and deacons of the High Street church. The funds received by the pastor and deacons of the John Street church were invested by them and known as the "Rogers Fund," and from time to time the income has been paid over by them to the John Street Congregational Society which owned the meeting house where the John Street church worshipped. Most of the mem-

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bers of the society were also members of the church. The John Street church has ceased to exist, and the meeting house has been sold, and the church and the society have both voted to discontinue religious worship and to make proper disposition of their funds and other property. The brother and sisters of the testator have deceased, — one sister, Elizabeth, dying testate, and the brother and other sister intestate, and all without issue. The only next of kin is a nephew, a son of a deceased brother. Due notice has been given to all parties interested and they have appeared and answered.

The fund held by the complainants represents what was supposed to be the interest of the John Street church in the bequest. No contention is made that the fund is not to be held in the same manner, and is not impressed with the same trusts as the real estate, though it is contended by the pastor and deacons of the High Street church that the principal of the gift was improperly divided, and that they are entitled to the whole fund. But we think that the bequest was to the respective pastors and deacons of the two churches as tenants in common and not as joint tenants. The property is expressly given to them "in two parts . . . to be equally divided between the said churches" with a direction, as we construe the will, to use only the interest and income which is to be enjoyed and divided between the churches "in peace and harmony."

The first question is whether the bequest created a public charitable trust. We think that it did. The general charitable intent of the testator is shown by the expression of his desire in the prefatory part of the will to dispose of his property for the benefit of his brother and sisters "and in charity." This expression of his desire as to the disposition of his property would not, without anything more, have constituted a valid bequest, charitable or otherwise. But the testator follows it up by providing for his brother and sisters, and by the bequest in question. And whatever doubt may have existed formerly, it must be regarded as now settled in this Commonwealth by the more recent decisions that a gift to a church generally creates a public charity. *McAlister* v. *Burgess*, 161 Mass. 269. *Bartlett, petitioner*, 163 Mass. 509. *Minns* v. *Billings*, 183 Mass. 126. If a gift to a church generally creates a valid public charity, we can

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see no good reason why a gift to the pastor and deacons of a church as trustees and their successors forever for the support of the church in its religious worship should not also be held to create a public charitable trust. It relates in like manner to the general promotion of public worship and religious instruction. We are therefore of opinion that the bequest created a valid public charitable trust.

It is well settled, that if, where there is a general charitable intent, it becomes impracticable in consequence of a change in circumstances to administer the trust in the precise manner provided by its creator, the doctrine of *cy pres* will be applied, and the trust will be administered in a manner that shall conform as nearly as possible to its terms. *Attorney General* v. *Briggs*, 164 Mass. 561. *Teele* v. *Bishop of Derry*, 168 Mass. 341. Usually the matter is referred to a master to report a scheme, but there can, of course, be no objection to the framing of a scheme by this court or to its adopting one that is proposed. The High Street church originally was established by the aid and co-operation of the John Street church. Many of the former members and attendants of the John Street church attend there, and it is of the same religious denomination besides being one of the two churches which the testator selected as the objects of his bounty. Taking all of the circumstances into account it seems to us that the fund should be paid over to the pastor and deacons of the High Street church to be administered by them for the support of religious worship in that church in the manner as near as may be in which the testator directed that it should be used for the support of religious worship in the John Street church.

Decree to be framed by a single justice in accordance with this opinion.

A. P. Sawyer, for the plaintiffs, stated the case.

J. F. Haskell, for the High Street church.

J. J. Pickman, for the Rogers Hall.

C. H. Conant, for John Z. Rogers.

F. H. Nash, Assistant Attorney General, for the Attorney General, submitted a brief.

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BOSTON SAFE DEPOSIT AND TRUST COMPANY, trustee, *vs.* WALTER N. BUFFUM, administrator, & others.

Middlesex. December 9, 1903. — June 24, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Devise and Legacy, Construction.

Words omitted from a will presumably by mistake can be supplied by the court only when the words used by the testator show by necessary implication what words were omitted. Following *Child* v. *Child*, 185 Mass. 376.

A testator having a son and a daughter left to his son $100 "if in the opinion of the trustees he is worthy of it," and left the bulk of his property to trustees, to convert it wholly into personal property and pay the net income to his daughter "for her sole use and benefit during her natural life." At the time of the testator's death his next of kin were his son and daughter. *Held*, that as to the disposition of his property after the death of his daughter the testator died intestate.

BILL IN EQUITY, filed February 27, 1903, by the trustee under the will of Abial Coolidge, late of Cambridge, for instructions.

The case came on to be heard before *Morton*, J., who at the request of the parties reserved it upon the bill and answers and an agreement of the parties for determination by the full court.

W. D. Whitmore, Jr., for the trustee.

W. N. Buffum, special administrator, *pro se*.

J. W. Corcoran & W. B. Sullivan, for James F. Coolidge and others, submitted a brief.

LORING, J. Abial Coolidge by his last will and testament directed that his debts be paid, bequeathed his furniture to his daughter Margaret Ann Holden, gave $100 to his son Oliver "if in the opinion of the trustees he is worthy of it," and $100 to each of three grandchildren, apparently children of Oliver. The will ended with this clause: "Fifth. I order and direct my trustee or trustees to sell and convey for the best price that can be obtained therefor my land and dwelling house situated on Washington Clark and More Streets at Cambridgeport and to make execute and deliver to the purchaser or purchasers thereof his or their heirs and assigns a good and sufficient deed or deeds thereof in fee simple, and the proceeds thereof to be

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invested, and together with the residue or balance of my property after the above legacies are paid to be placed in the hands of trustee or trustees and the nett income thereof I give and bequeath to my daughter Margrett Ann Holden for her sole use and benifit during her natural life, to be paid to her semiannulary on her own personal receipt."

The plaintiff was appointed trustee under this fifth clause. Margaret Ann Holden has died and this bill is brought asking the instructions of the court as to the distribution of the corpus of the trust fund which was and always has been made up of personal property.

The testator's next of kin at the time of his decease were Margaret Ann Holden, his daughter, and Oliver S. Coolidge, his son. The son died after his father and before his sister. The administrator of the son claims that Margaret had a life estate in the trust property, that the testator died intestate so far as the remainder subject to Margaret's life estate is concerned, and that as administrator of the son's estate he is now entitled to one half of the trust fund. The special administrator of the estate of Margaret claims that she was given the whole beneficial interest in the trust property, and that as special administrator of her estate he is now entitled to the whole of it.

In support of his contention Buffum, the special administrator of the daughter's estate, points out that the intention of the testator is plain that the son should have $100 and no more out of his estate, that he did not intend to die intestate, and therefore it was the intention of the testator that the daughter should take the whole interest in the trust fund, and that the court will supply the missing words on the doctrine of *Metcalf* v. *First Parish in Framingham*, 128 Mass. 370.

But a court is not at liberty to deal with a last will and testament in that way. It is its duty to construe the will which the testator has made, not to speculate on his intentions and make a will for him. For that reason missing words can be supplied only in interpreting the words used by the testator, that is, when the words used show by necessary implication what the missing words are. *Child* v. *Child*, 185 Mass. 376. To supply missing words where the words used do not show what they must necessarily have been is to step over the limit of the power of the

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court which is to discover the intention which the testator has expressed by the words used by him.

The most that can be said in the case at bar is that from the terms of the bequest of the $100 to the son one would expect to find the whole trust estate given to some one else. But that expectation is not the fact. The whole trust estate was not given to some one other than the son. The fifth clause gave the daughter a life estate only in the trust fund. The remainder subject to that life estate was not disposed of. Inasmuch as this testator has not given the property to another, his son, by the statute of distributions, is entitled to one half of it.

Reluctant as a court is to come to the conclusion that a testator dies intestate as to part of his property, that conclusion is inevitable here; and the entry must be that the plaintiff pay over one half of the corpus of the estate to the defendant Buffum special administrator of the estate of Margaret Ann Holden, and one half to the defendant Ruggles administrator of the estate of Oliver S. Coolidge.

So ordered.

JAMES A. BAILEY, JR., trustee, *vs.* IDA S. DILLON.

Suffolk. December 15, 1903. — June 24, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Husband and Wife. Contract, Validity. *Equity Jurisdiction. Probate Court.*

A fair and voluntary contract between a wife and a trustee in behalf of her husband, under which the husband places in the hands of the trustee a fund for the support of his wife and the wife agrees that she will not make any further claim on her husband for support, is not void as against public policy.

A trustee for a husband, under a fair and voluntary agreement by which the husband has placed a fund for the support of his wife in the hands of the trustee and the wife has agreed that she will not make any further claim on her husband for support, cannot maintain a bill in equity against the wife to enjoin her from proceeding with a petition for support in the Probate Court, as the husband has a complete and adequate remedy by setting up the contract in the Probate Court as a bar to the petition.

The Probate Courts have full equity powers in regard to petitions for separate support.

Where a husband is seeking to enforce in equity a fair and voluntary agreement of his wife to accept a fund placed in the hands of a trustee for her separate maintenance and not to make any further claim on him for support, what would be the effect of the proof of a *bona fide* offer to return on the part of the wife, *quære*.

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BILL IN EQUITY, filed September 16, 1903, to enforce an agreement, under which the plaintiff was trustee for William Dillon, against Ida S. Dillon, the wife of William, by restraining the further prosecution by the defendant of a petition for support in the Probate Court for the county of Suffolk.

The defendant demurred to the bill. The case was heard by *Braley*, J., who made a decree that the demurrer be sustained, and, the plaintiff not desiring to amend his bill, that the bill be dismissed, without prejudice to the right of William Dillon to plead the subject matter of the bill in proceedings now pending in the Probate Court mentioned in the bill. The plaintiff appealed from the decree.

F. W. Kaan, for the plaintiff.

F. S. Hesseltine, for the defendant.

MORTON, J. This case comes here on appeal by the plaintiff from a decree sustaining the defendant's demurrer and dismissing the bill. The bill is brought by the plaintiff on behalf of and for the benefit of one William Dillon, husband of the defendant, to enforce a separation agreement entered into between the defendant and her husband through the intervention of the plaintiff as trustee. The agreement is dated July 30, 1903, and, after reciting that the defendant has left her husband without his consent and threatens proceedings for her support, and that to avoid such proceedings and make full and final provision for her support, the said William has placed in the plaintiff's hands the sum of $500 and two promissory notes of $250 each which are to be collected and with the $500 paid over to the defendant, provides, evidently in consideration of the payment thus to be made, that the defendant will not, amongst other things, make any further claim on him for support. The bill alleges that the plaintiff has paid over to the defendant the $500, and that he and the said William have fully performed all things in said agreement contained to be by them performed, but that the defendant, in violation of her agreement, has instituted proceedings in the Probate Court for the county of Suffolk to compel the said William to contribute further to her support. The grounds of demurrer are, that the bill does not state a case for equitable relief, and that the matter can and should be heard and determined in the Probate Court. Copies of the agreement and

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of the petition filed by the defendant in the Probate Court are annexed to the bill. The latter implies that a separation took place, and alleges, in substance, amongst other things, an offer to return. The bill does not set out the circumstances under which the agreement was entered into, or that a separation had taken place, or that the agreement was made in contemplation of an immediate separation, which took place and still continues, and it does not deny the allegation in the defendant's petition to the Probate Court of an offer to return. But, if such allegations are necessary in order to enable him to maintain it, the plaintiff, although an opportunity was given him to amend his bill and he did not do so, now desires an opportunity to amend the bill by alleging that the agreement was made in contemplation of an immediate separation, and that such separation took place and still continues, and by denying that there has been an offer to return. We assume that such amendments would be allowed, and therefore proceed to deal with the case as if the bill had been thus amended, though from the statement in the agreement that the defendant had left her husband without his consent, it might perhaps fairly be inferred that they were living separate and apart at the time when the agreement was entered into, and that the separation still continues.

The defendant contends that the agreement is against public policy and void. But similar agreements have often been upheld and enforced, and it is too late now to question their validity. *Page* v. *Trufant*, 2 Mass. 159. *Fox* v. *Davis*, 113 Mass. 255. *Alley* v. *Winn*, 134 Mass. 77. *Winn* v. *Sanford*, 148 Mass. 39. *Grime* v. *Borden*, 166 Mass. 198. *Walker* v. *Walker*, 9 Wall. 743. *Galusha* v. *Galusha*, 116 N. Y. 635. *Wilson* v. *Wilson*, 1 H. L. Cas. 538. *Gibbs* v. *Harding*, L. R. 8 Eq. 490. *Wilson* v. *Muskett*, 3 B. & Ad. 743. The defendant was not obliged to enter into the agreement. If the facts warranted her in so doing, she could have filed a libel for divorce or brought a petition for separate support, as she has now done, but she did not do either. Instead she entered into the agreement in question. She did this freely and voluntarily, for aught that appears, and we see no reason why, as a matter of public policy, she should not be bound by it, if otherwise valid, so long, at least, as the separation continues. What circumstances if any will absolve her

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from the obligations of the contract is not before us, and need not now be considered. Neither do we see any valid reason why, if the husband and the trustee have done all that they were to do under the agreement, and the separation still continues, the husband is not entitled in equity to have it specifically performed by the defendant, and to have her enjoined from prosecuting her petition in the Probate Court, if he cannot avail himself of the agreement as fully and effectually in the proceedings that have been instituted by her in that court, as in a suit brought by him to enforce its specific performance. There is nothing in the nature of the contract, or in the relations of the parties, inconsistent with such relief. In the leading case of *Wilson* v. *Wilson*, 1 H. L. Cas. 538, the husband was compelled to specifically perform the agreement by executing it, which he had refused to do, and was restrained from causing the suit which his wife had instituted in the ecclesiastical court for a nullity of the marriage, to be prosecuted by her. See also *Hunt* v. *Hunt*, 4 DeG., F. & J. 221. In *Williams* v. *Baily*, L. R. 2 Eq. 731, 734, it is said that deeds of separation are perfectly valid, and can be enforced against the wife. And in *Besant* v. *Wood*, 12 Ch. D. 605, an injunction was issued restraining the wife from suing for a restitution of conjugal rights. Such contracts do not stand, however, upon the same footing in all respects as ordinary contracts, and courts of equity will not enforce them, especially against the wife, unless they are free from fraud and coercion, and are fair and reasonable. *Hendricks* v. *Isaacs*, 117 N. Y. 411. *Hungerford* v. *Hungerford*, 161 N. Y. 550. *Dutton* v. *Dutton*, 30 Ind. 452. *Switzer* v. *Switzer*, 26 Gratt. 574. *Randall* v. *Randall*, 37 Mich. 563. *Daniels* v. *Daniels*, 9 Col. 133. 1 Bish. Mar. Div. & Sep. § 1280. But the probate courts are not courts of general equity jurisdiction. They have equity jurisdiction only in those cases where it is expressly conferred upon them, and, except in such cases, their rules of evidence and of property are the same as those which govern courts of common law. *Sullings* v. *Richmond*, 5 Allen, 187, 192. Neither does the statute in regard to equitable defences apply to probate courts. R. L. c. 173, §§ 28, 32. It is, however, expressly provided that, in reference to petitions by married women for separate support, "the provisions of sections fourteen, twenty-

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nine and thirty-one of chapter one hundred and fifty-two shall apply to proceedings upon such petition, so far as appropriate." R. L. c. 153, § 35. Section 29, above referred to, provides in reference to matters of divorce that, "The Superior Court may, if the course of proceeding is not specially prescribed, hear and determine all matters coming within the purview of this chapter according to the course of proceeding in ecclesiastical courts or in courts of equity." According to this the probate courts have full equity powers in regard to petitions for separate support, and we think, therefore, that the plaintiff can avail himself of the agreement as fully and effectually in the proceedings in the Probate Court as he could in this, and that the remedy thus afforded is adequate and complete. In *Silverman* v. *Silverman*, 140 Mass. 560, it was held that an agreement between the husband and the wife whereby she released him from all claim for her support was not a bar to a petition by her under Pub. Sts. c. 147, § 33. But this was on the ground that the contract having been entered into directly between the husband and wife was void. In the present case the agreement was between the wife and a trustee. In *Sullings* v. *Richmond*, *ubi supra*, it was held that an antenuptial contract did not operate as a bar to a claim by the widow in the Probate Court to a distributive share of her husband's estate. This was on the ground that the remedy of those claiming under the contract was in equity and the Probate Court had no power to enforce the contract,—an objection which, as we have seen, does not apply to proceedings instituted by the wife in the Probate Court for a separate support. It is plain that, notwithstanding the agreement is between the wife and the trustee, the plaintiff can avail himself of it in defence of the proceedings in the Probate Court. *Alley* v. *Winn*, 134 Mass. 77. And if the agreement was understandingly entered into by her, and is free from fraud and coercion, and is fair and reasonable, and the parties are still living separate and apart, we do not see why it should not operate as a bar to the proceedings instituted by her in the Probate Court. See *Squires* v. *Squires*, 53 Vt. 208. What the effect of a *bona fide* offer to return on her part would be is not before us, and it is not necessary now to consider.

Decree dismissing bill affirmed.

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NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY *vs.* CITY OF CAMBRIDGE.

Middlesex. December 16, 1903. — June 24, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Railroad. Municipal Corporations, Ordinances.

A railroad company maintaining gates where its tracks cross a public highway at grade has a right to dig up the surface of the street within its own location to repair the gates so as to operate them as required by law, without obtaining permission from the city maintaining the highway, and an ordinance of the city requiring the railroad company to apply for a license or give a bond before doing such work would be void.

An ordinance of a city forbidding the digging up of the ground in any street or otherwise occupying, encumbering or obstructing the street without obtaining a written license from the superintendent of streets and complying in all respects with the conditions of such license, cannot be construed to apply to repairs made by a railroad company within its own location where its tracks cross a highway at grade.

BILL IN EQUITY, filed January 2, 1903, to restrain the city of Cambridge from interfering with the lawful acts of the plaintiff in maintaining and repairing its railroad within the limits of grade crossings in that city and particularly from interfering with the acts of the plaintiff or its servants and agents in digging up the surface of Cambridge Street within its railroad location for the purpose of repairing the gates at the grade crossing of that highway.

The case came on to be heard before *Morton*, J., who reserved it upon the bill and answer and such testimony as should be found to be competent for determination by the full court, such order to be made as law and justice might require.

S. Hoar, (*W. Hudson* with him,) for the plaintiff.

G. A. A. Pevey, for the defendant.

BARKER, J. The place where the plaintiff's railroad crosses Cambridge Street is subjected by law to two coexistent uses. It is at once a public way and a railroad location. Because it is the latter the plaintiff has the right to construct, maintain, repair and operate there its railroad and such structures and apparatus as it is required to have there for the proper prosecution

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of its work as a common carrier by means of steam cars. Because the land is a public way the city also has some duties and rights with reference to the same territory, arising from its obligation to keep the public ways within its limits reasonably safe and convenient for ordinary travel.

The present controversy arises from a contention on the part of the city that its own rights and duties with reference to the land are paramount and superior to those of the plaintiff, and that the latter cannot dig up the surface of the land to repair structures and apparatus which it must there maintain and operate except by the permission of and under the control and authority of the city. In accordance with this contention the officers and agents of the city, by verbal prohibitions and the actual display of physical force and threats, have prevented the plaintiff from opening the surface of the land within the railroad location in order to repair certain gates which the plaintiff is there required to maintain and operate as a means of securing the safety of travellers. The powers and rights now in question are purely statutory, and unaffected by the fact that the plaintiff's lessor has title in fee to part of the land.

The relative rights and duties of railroad corporations and of municipalities charged with the care of public ways crossed at the same level by railroads, with respect to the territory included at the same time within the railroad location and the limits of the way have often been before the courts for adjudication. In *Lowell* v. *Boston & Lowell Railroad*, 23 Pick. 24, 30, it was held that a railroad company undoubtedly had a right to make excavations in a highway for the purpose of constructing its railroad, and that the company was not bound to erect barriers across the way if it had given seasonable notice of its intended operations to the officers of the town, and that after barriers were erected the company might take them down from time to time if necessary for removing rocks and rubbish which could not be removed otherwise.

In *Jones* v. *Waltham*, 4 Cush. 299, a deep pit unrailed had been constructed by the railroad company for a cattle guard next to the line of the highway, and it was held that if the town had made the crossing safe and convenient except so far as the construction and operation of the railroad rendered it im-

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practicable to do so without interfering with the railroad the town was not liable. See *Davis* v. *Leominster*, 1 Allen, 182, 184. The same principle was applied in *Vinal* v. *Dorchester*, 7 Gray, 421, where the injury was occasioned by the actual running of a train across the highway at a level crossing. In that case it was said, "Towns . . . can neither enlarge nor diminish the powers and privileges, or the duties and responsibilities of railroad corporations." So in *Noyes* v. *Gardner*, 147 Mass. 505, 509, it is held that the liability of a town is limited to the extent to which "the construction or operation of the railroad, deprives the town of the power to discharge the general statutory duty to which it is subjected."

In *Old Colony Railroad* v. *Fall River*, 147 Mass. 455, 464, the general principle governing the municipality and the railroad corporation in the exercise of the powers and duties of both at crossings is held to be that the town and the railroad are each left to perform its own duty as it may, having regard to the rights of the other. So in *Flanders* v. *Norwood*, 141 Mass. 17, 19, it was said, "Railroads and highways are equally parts of the system which provides for the public travel. When they cross each other, and thus jointly use the same ground, it is necessary that reasonable rules should be adopted to reconcile this joint use." In that case a bridge which carried the railroad across the way at a level higher than the travelled path having been burned, the railroad company built a temporary bridge supported by timbers and trestle work which obstructed travel on the highway. It was held that it was not the right and duty of the officers of the town to remove these supports, and that it was the right and duty of the railroad to rebuild its bridge even if it would be impossible to do this without obstructing the highway to some extent.

In *Commonwealth* v. *Hartford & New Haven Railroad*, 14 Gray, 379, the railroad at a level crossing having been constructed with but a single track, it was held that the company might put down and maintain within its location the number of tracks essential for the convenient transaction of its business, and for that purpose make any necessary alteration in the grade or surface of the highway there.

So, in the moving of trains "Railroads, from the necessity of

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the case, have the right to the exclusive use of grade crossings when their trains are passing." *Granger* v. *Boston & Albany Railroad*, 146 Mass. 276, 280. *Marden* v. *Boston & Albany Railroad*, 159 Mass. 393, 396. The right to this exclusive use extends to the switching of cars and the making up of trains when done only to a reasonable extent and in a reasonable manner. *Gahagan* v. *Boston & Lowell Railroad*, 1 Allen, 187.

The tracks of a railroad are supported and kept in place by ties imbedded in the ground beneath its surface. The planking laid on each side of and between the rails to facilitate passage across them, and the rails themselves are parts of the surface of the highway at a level crossing. It may be necessary at any moment for the railroad company to disturb these parts of the surface of a street at a level crossing to make repairs absolutely essential to the operation of the railroad. Anything which imposes upon the company delay in the making of such repairs, or makes their right to proceed with them contingent upon obtaining permission from some independent repository of power, is a menace to the safety of the public. Besides this there were at the Cambridge Street crossing gates which the plaintiff was required by law to maintain and operate, which were out of repair, and which were so constructed as to make it necessary to dig up the surface of the street in order to repair them so as to operate them as required by law.

The actual conflict between the plaintiff's workmen and the defendant's policemen came in consequence of the defendant's contention that the plaintiff before proceeding to dig up the street within its own location must apply for a license from the city officials and give a bond to the city under certain city ordinances. These ordinances were not drawn with special reference to the opening up of the surface of streets by railroad companies at crossings. They rest on no legislative authority except the general power given to municipalities to make by-laws and ordinances not inconsistent with law. Neither St. 1853, c. 151, § 1, nor the statutes constituting the charter of the city give it any right to make ordinances which shall restrict the power of the plaintiff to construct, repair and operate its railroad. The power given in St. 1853, c. 151, § 1, to determine in what manner the railroad shall be constructed across the streets

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within the city of Cambridge and what securities shall be provided and maintained by the railroad company at such crossings is of the special class mentioned in *Vinal* v. *Dorchester*, *ubi supra*, and in its exercise the officers of the city do not act under its authority nor as its agents, or by force of its ordinances. The ordinances are adopted *alio intuitu* and cannot be justified in their present form under that statute, if construed to apply to territory included within the limits of the location of a steam railroad.

The defendant's ordinances forbid the digging up the ground in any street, or otherwise occupying, encumbering or obstructing the street without first obtaining a written license from the superintendent of streets, and complying in all respects with the conditions of such license. If construed to apply to railroad corporations at street crossings, as every passing locomotive or car occupies and obstructs the street, the ordinance would require a written license from the superintendent of streets for the passage of every train. The ordinance requires the party licensed to fence the excavation or obstruction and to light it at night. It authorizes the superintendent of streets to prescribe a time within which the street shall be restored to good condition, and requires the license to be delivered up to him on or before the expiration of the time so limited, and requires the licensee to pay whatever sum the superintendent may expend for putting the street into good condition, thus impliedly giving him authority to interfere with or himself undertake the construction of the railroad and its appliances at the crossing, if the ordinance is applicable. It further gives the superintendent power for one year after any portion of a street has been excavated to make forthwith such repairs as the superintendent deems necessary, and in case of failure to comply with such an order gives the superintendent the right to make them at the expense of the licensee. If construed to apply to railroads the statutory right of the railroad company to construct, maintain, repair and operate its own railroad can be exercised only upon consent of the superintendent of streets and only in the manner stated in his license, and for a year thereafter he has authority to enter upon and alter as he deems necessary the surface of the railroad at the crossing. The ordinance forbids him to issue any license to a person who

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within a year has failed to comply with the terms of a license. The license may be revoked at any time, and it cannot be obtained except by giving a bond to indemnify the city from all liabilities, loss and expense which the city may incur.

It is obvious that if the ordinance is to be construed to apply to railroad corporations in the exercise of their rights at grade crossings it prevents the exercise of those rights in every instance until after a delay which is equivalent to a denial of the right and which may in the meantime subject the public to danger and the railroad corporation to liability and expense not contemplated by law. Besides this it attaches to the exercise of the right of the railroad corporation to keep its own roadbed and tracks in repair and to operate its railroad requirements on the part of the city which both diminish the powers and privileges and enlarge the duties and responsibilities of the company contrary to the rule stated in *Vinal* v. *Dorchester*, *ubi supra*, and to the theory of the statutes defining the obligation and rights of municipalities and of railroad corporations.

If the defendant's ordinance were to be construed literally and as applying to the operations of railroad companies within the limits of their own locations it would be void as contrary to law. But similar ordinances and by-laws are in existence in many places, and it never has been contended that they should be construed to apply to railroad companies as to operations within the limits of their own locations. We are of opinion that the defendant's ordinance was not intended to and ought not to be construed to have application to the operations of railroad corporations at places where their railroads cross public ways, and that the whole position of the city authorities which has given rise to the present controversy is unsound and untenable.

As the defendant has placed its defence upon its incorrect construction of the relative rights and obligations of the parties to the suit, rather than on the question whether the bill is an appropriate method of bringing the controversy here for determination, it is not necessary to discuss that question.

Decree to be entered for the plaintiff.

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ARTAKY BAKSHIAN *vs.* MEHMET HASSANOFF.

Suffolk. December 17, 1903. — June 24, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Equity Pleading and Practice, Master's report.

The recommitting of a master's report is a matter of discretion not open to revision by this court.

Where the evidence is not reported the findings of a master on matters of fact cannot be revised.

BILL IN EQUITY, filed January 20, 1902, described in the second paragraph of the opinion, and a CROSS BILL, filed March 17, 1902, described in the third paragraph of the opinion.

In the Superior Court *Fox*, J. made the following decree:

"This cause came on to be heard upon the bill and answer, the report and supplemental report of the master and the exceptions of the defendant thereto and his motion to recommit, and was argued by counsel, and thereupon, upon consideration thereof, it is

"Ordered, adjudged and decreed that the said exceptions be and they hereby are severally overruled, the motion to recommit be and the same hereby is denied, the master's supplemental report and original report as modified by the supplemental report be and the same hereby are confirmed, and judgment ordered to be entered in favor of the plaintiff for the sum found by the master, to wit, the sum of $351, with interest from the date of the writ, and costs in favor of the plaintiff to be taxed by the clerk of court."

The defendant appealed from this decree.

C. W. Spencer, for the defendant.

H. W. Ogden, for the plaintiff.

BARKER, J. After the parties were at issue upon a bill in equity and a cross bill the two suits were referred to a master under a rule which is not shown to have required him to report the evidence or any part thereof. Exceptions were taken by the defendant to the master's report, it was recommitted, and a

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supplemental report was made to which the defendant took exceptions. He also moved to recommit the cases to the master for the second time. Thereafter a final decree was entered, denying the motion to recommit, overruling both sets of the defendant's exceptions to the report, confirming the original report as modified by the supplemental report, and ordering judgment to be entered for the plaintiff in the sum of $351 found due him by the master with interest and costs. The record contains no statement of the evidence which was before the master, and the case is here upon the defendant's appeal from the final decree.

The bill in which the decree was entered was brought for breach of an agreement entered into between the parties under date of March 21, 1901, whereby the plaintiff was to be in the employment of the defendant for one year at a salary of $10 a week as manager of a business of selling oriental rugs, and was to assist the defendant in selling rugs and carpets, and also was to have one half of the profits of the business, and there was also a claim for money paid.

The cross bill set up an alleged indebtedness due from the plaintiff in the bill to the defendant on account of an unpaid loan made before the contract of March 21, 1901. The answer to the cross bill admitted the loan but alleged that it had been overpaid.

The original report of the master found that upon the matters alleged in the cross bill and the answer thereto the claims of each party offset those of the other. The report found in favor of the plaintiff on the matters at issue in the original bill, and awarded him a sum ascertained by allowing him $520 for the year's wages and $50 for cash expended and deducting $81 for cash paid by the defendant. No allowance was made for profits, the master finding that they were too conjectural, no business having been done.

Two exceptions were filed to this report by the defendant. The first was that the master erred in ruling that as to the alleged loan the claims of each offset the claims of the other and that there was nothing due the defendant on March 21, 1901. The second exception was that the master erred in finding the plaintiff entitled to recover for his services for one year.

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The case then came on to be heard on the defendant's motion to recommit, and the report was recommitted with a memorandum stating that the plaintiff having brought his suit before the end of the contract term was not entitled to recover his wages as such, but unliquidated damages for breach of contract, that in estimating such damages the court has the right to take into account the wages which the plaintiff would have earned, but the wages are not necessarily the measure of damages, (citing *Paige* v. *Barrett*, 151 Mass. 67, 68, and *Cutter* v. *Gillette*, 163 Mass. 95, 97,) and that as the master appeared to have proceeded upon an erroneous theory of the law the report was recommitted with instructions to report the facts upon that single point.

Thereafter the supplemental report was made stating that the master found that the plaintiff made due and reasonable efforts to procure employment of the same character as called for by his agreement with the defendant, that he had found employment for a part of the time and received therefor $138, and finding and reporting that the plaintiff under his own bill was entitled to recover the sum of $351.

On the coming in of this report the defendant moved to recommit it for a fuller report of the facts on which the master based his findings, and especially as to what efforts the plaintiff made to secure other employment and making certain allegations as to the testimony of the plaintiff. At the same time the defendant filed three exceptions to the supplemental report.

1. Whether the judge should recommit the report was a matter of discretion the exercise of which will not be revised by this court.

2. The first exception to the original report goes upon the theory that the loan of £41 8s. was admitted by the plaintiff and that the only offset or payment which could have been found was a sum of £40 for twenty weeks' work at £2 per week, beginning November 6, 1900. But the plaintiff's answer to the cross bill, besides setting up the £40 due him for work, in effect alleged that he had repaid the loan and that the defendant owed him. As the evidence is not stated it cannot be said that the master was wrong in finding that there was nothing due from the plaintiff upon the loan.

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3. The second exception to the original report was in effect sustained by the ruling that the master in allowing the plaintiff wages for one year had proceeded upon an erroneous theory of law, and the exception is now immaterial because the case was recommitted to the master on the point raised by the exception, and a different rule applied by him in the supplemental report.

4. The first exception to the supplemental report is upon the ground that the master erred in finding that the plaintiff made due and reasonable efforts to procure employment of the same character as that called for by the agreement, because that finding is inconsistent with the plaintiff's testimony and inconsistent with the findings of the master in the supplemental report. As to the first ground, the evidence is not before us. As to the second ground there is an express finding as matter of fact that the plaintiff did make such efforts, that he did find employment for part of the time and earned from it $138, and the report contains no finding of fact inconsistent with the finding excepted to.

5. The second exception to the supplemental report seeks to attack as a ruling of law a finding of fact. The hearing was not concluded until after the expiration of the term of employment fixed by the contract. The actual and the possible earnings of the plaintiff were then not matters of future estimation, and the correctness of their assessment by the master depended upon the evidence which is not before us. It does not appear upon the record that the master was asked by the defendant to make any ruling of law upon the point to which the exception is directed, or that the master made an erroneous ruling of law.

6. The third exception to the supplemental report is directed to the question of law whether the plaintiff was only obliged to use reasonable efforts to procure employment of the same character as called for by the agreement, the exception in effect taking the ground that he should have used reasonable diligence in endeavoring to procure a position as salesman or manager in the rug business. The exception read with the agreement is not easily intelligible. The agreement stipulates that the defendant shall employ the plaintiff and the plaintiff shall serve the defendant as general manager of a rug business, and also that he shall assist in sales. If the exception is intended to raise the question

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whether the plaintiff ought to have sought employment as a salesman it is enough to say that it does not appear upon the record that such a ruling was requested before the master, nor that the master ruled that the plaintiff was not bound to seek employment as a salesman. The agreement besides stipulating that the plaintiff shall serve as general manager also requires him diligently to assist the defendant in the sale of rugs and carpets, so that the character of the employment called for by the agreement included that of a salesman as well as of a manager, and the presumption from the finding is that he looked for work as a salesman as well as manager.

The defendant has not argued his specific exceptions, but has argued that the plaintiff himself terminated his employment, and also that he was bound to seek any other employment. As to the first contention it depends upon questions of fact found against the defendant by the master and which as the evidence is not here we cannot revise. As to the second contention the record does not show that it was raised before the master or before the court below, and it is not open here.

Decree affirmed.

MABEL Y. HOWE & another *vs.* SARAH RICHARDSON & another.

SARAH RICHARDSON & another *vs.* MABEL Y. HOWE & others.

Suffolk. December 17, 1903. — June 24, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Executor. Contract, Implied.

Where executors under the will of a testator who had been conducting a mercantile and manufacturing business on borrowed capital, not being authorized by the will to carry on the business, but carrying it on by agreement of all parties interested for the purpose of preserving the business as a going concern, in good faith borrow money from the mother of one of the executors to use in the business, the son under authority from the other executors signing the note in the name under which the testator conducted the business, by himself "as executor", and the money is used in discharging debts of the business, and later the executors sell the business to a purchaser who agrees to assume and pay all

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debts incurred by the executors in carrying on the business, the lender can maintain a suit in equity to recover the amount of the loan from the purchaser, the executors being liable for this indebtedness as money lent or money had and received, if they are not liable on the note.

BARKER, J. The general facts are these. John C. Howe died testate on September 25, 1901. Up to his death he had been carrying on business under the name of Howe and French. For some time this business had been conducted for him by Charles F. Richardson. Mabel Yates Howe, Walter Ashley Priest and Charles F. Richardson were duly made executors of the will. The will contained no provision for carrying on the business. The executors to preserve it as a going concern, in order that it might be disposed of or turned over to the beneficiaries under the will as a going concern, at the request of the beneficiaries under the will took possession of the business and carried it on under the name of Howe and French and the management of Charles F. Richardson until April 18, 1903. On or about that day Mabel Yates Howe and Marie Howe Yates bought the business of the executors, with the assent of the beneficiaries, subject to the liabilities of the business and agreeing to assume and pay all the debts incurred by the executors in conducting the business.

The testator in his lifetime had carried on the business upon borrowed capital. Charles F. Richardson in the lifetime of the testator had carried on the business as his manager and attorney having a salary as such and also a share of the profits. He continued to act as manager after the death of the testator without any new arrangement as to compensation.

At four different times after the testator's death Sarah Richardson, the mother of Charles F. Richardson, at his request made loans of money to Howe and French to be used in carrying on the business. The money lent was lent in good faith and was duly put into the funds of Howe and French and at once properly used in paying debts of the concern. The loans were of $3,000 on September 23, 1902, $3,000 on December 24, 1902, $3,000 on March 3, 1903, and $1,500 on April 10, 1903. Notes for each of these loans were signed "Howe & French by Charles F. Richardson, Executor," which notes are now held by Sarah Richardson.

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Immediately after the sale of the business of Howe and French the purchasers, Mabel Yates Howe and Marie Howe Yates, terminated Charles F. Richardson's employment as manager of the business. Thereupon on May 26 the demand notes given for the four loans specified were put into bank for collection, presented at the office of Howe and French and refused payment, and then the first of the two bills in equity, sworn to on May 27, and filed on May 28, was brought by Mabel Yates Howe and Walter Ashley Priest, in the interest of Mabel Yates Howe and Marie Howe Yates against Charles F. Richardson and Sarah Richardson, asserting that the four loans had been made by the latter to the former for his individual use or account, that the four notes were not given to her for moneys lent by her to the executors carrying on business under the name of Howe and French, that no money had been lent by her to the executors, and that she had paid no consideration for the notes and was not a *bona fide* holder thereof for value, and praying for a preliminary injunction against her to restrain her from negotiating the notes or bringing suit upon them, and that she be ordered to deliver them up to be cancelled.

On June 4, 1903, Sarah Richardson and Charles F. Richardson filed the second bill in equity against Mabel Yates Howe, Walter Ashley Priest, who had declined to become a plaintiff in it, and Marie Howe Yates. This bill recites the circumstances of the death of John C. Howe, the proof of his will and the appointment of executors, their carrying on of the business under the name of Howe and French, the sale of that business to Mabel Yates Howe and Marie Howe Yates, the making of the four loans by Sarah Richardson to the executors for the use of the business and their use in that business of the money so lent, and the giving of the four demand notes, alleges that Mabel Yates Howe and Marie Howe Yates ought to pay out of the assets of Howe and French the debts created by the four loans and the notes, and that the assets of Howe and French transferred to them by the executors are chargeable with such payment, and prays that the notes be adjudged to be debts incurred by the executors in conducting the business of Howe and French and chargeable upon the assets of Howe and French received from the executors by Mabel Yates Howe and Marie Howe Yates, and that they may be ordered to pay them out of those assets.

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Answers were filed to each bill, and on June 12, 1903, all the parties stipulated that the causes should be treated as one cause and be heard together, and that if it should be decided therein that the three executors were liable in any form on the notes or for the amount thereof to Sarah Richardson, a final decree might be entered ordering Mabel Yates Howe and Marie Howe Yates to pay to Sarah Richardson the amount found due upon said notes or obligation.

The cases were heard as one cause by Mr. Justice Morton, who filed a memorandum containing a statement of facts found by him, and a final decree was entered in these words: "These causes came on to be heard as one cause, by agreement of the parties, upon the merits, and were argued by counsel; and thereupon, upon consideration thereof and of the agreement of the parties filed, it is hereby ordered, adjudged and decreed that Mabel Yates Howe and Marie Howe Yates pay to Sarah Richardson the sum of ten thousand eight hundred and two dollars and seventy cents ($10,802.70), being the amount of the loans by her to the executors of John C. Howe with interest to June 26, 1903," that being the date of the decree.

The evidence was taken under the Chancery Rule 35, and the report of the commissioner is part of the record, and the record states requests on the part of Mabel Yates Howe, Walter Ashley Priest and Marie Howe Yates for findings of facts and for rulings of law. The causes are before the full court upon their appeal from the decree of June 26, 1903.

The memorandum filed by Mr. Justice Morton containing his finding of facts and rulings of law is as follows:

"Memorandum of Decision.

"In these cases I find the following facts: —

"John C. Howe died testate on September 25, 1901, leaving a will which was duly proved and allowed, and of which Mabel Yates Howe, Walter Ashley Priest, and Charles F. Richardson were duly appointed executors. At the time of his death said Howe was carrying on a mercantile and manufacturing business, under the name of 'Howe & French.' The will gave the executors no authority to carry on the business. But for the purpose of preserving the business as a going concern, it was understood and agreed by all parties interested that the executors should

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continue to carry on the business under the name and style of Howe & French, and they did so till April 18, 1903, when the business, and the assets employed therein, were transferred by the executors, with the consent and agreement of all parties interested, to Mabel Yates Howe and Marie Howe Yates, subject to the liabilities of the business, said Mabel Yates Howe and Marie Howe Yates agreeing to assume and pay all the debts that had been incurred by the executors in carrying on the business of Howe & French. In order to facilitate carrying on the business the other two executors gave to Richardson a power of attorney, of which a copy is annexed to the defendant's answer in *Richardson et al.* v. *Howe et al.* The business was carried on by the testator in his lifetime largely with borrowed money, and continued to be so carried on by the executors, money being borrowed by them at different banks. At the time when the notes which are the subject of these suits were given, the executors had about reached the limit of their credit at the banks where they were accustomed to borrow. To have attempted to borrow more at those banks would have impaired their credit or the credit of Howe & French. It became necessary to have more money to carry on the business. Whereupon the said Charles F. Richardson, acting under the authority given him by the other executors, and for the benefit of all parties interested, went to his mother, Sarah Richardson, one of the defendants in one of these suits, and one of the plaintiffs in the other, and obtained from her various sums, amounting in all to the sum of $10,500, for which the notes of Howe & French, which are the subjects of these suits, were given. This money was lent by Mrs. Richardson to Howe & French, and I find that the executors were carrying on the business under that name and style, and that the money that was borrowed went into the business and was used to take up notes that had been given by Howe & French and to pay acceptances by Howe & French that had been given for merchandise used in the business. Mrs. Richardson left the details of the various transactions to her son, and in making and procuring the loans he acted as the agent of his mother as well as for and on behalf of Howe & French. There is nothing to show that he did not act in entire good faith. The money that was borrowed from Mrs. Richardson was entered on

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the books of Howe & French to the credit of Charles F. Richardson, and he appears to have drawn against it from time to time. But I find that these entries were made by the bookkeepers as a matter of bookkeeping, without his knowledge or authority, and that there was and is an unsettled account for service between him and Howe & French which would explain, if necessary, the sums that he has drawn.

"On all the evidence I find and rule that the executors are personally liable for the sums lent by Mrs. Richardson to Howe & French, and that in accordance with the stipulation, a decree should be entered, ordering Mabel Yates Howe and Marie Howe Yates to pay to Sarah Richardson the amount due, namely, $10,500, with interest.

"I do not think that it is necessary to pass upon the question whether the executors are liable upon the notes. If they are not then I think that they are liable for money lent or money had and received.

"I give the rulings and make the findings requested so far as they are consistent with the rulings and findings made above. So far as they are inconsistent with them they are refused.

"James M. Morton, J. S. J. C."

With reference to the findings of fact our examination of the commissioner's report of the evidence shows us that they were justified by the evidence, and we are of the opinion also that the record discloses no error of law.

The position of the appellants seems to have arisen from a difference of opinion as to the amount of compensation due to Charles F. Richardson as manager of the business of Howe and French from the time of the death of John C. Howe to that of the sale of the business by the executors, and to a misconception that the loans were made by Sarah Richardson to her son personally and not to the executors or to the business, which misconception very likely came from ignorance on the part of the appellants of the making of the loans and of the existence of the notes until after the sale of the business, and from the way in which the entries concerning the loans and the notes were made by the bookkeeper in charge of the books of Howe and French upon the books relating to that business.

The money lent by Sarah Richardson on September 23, 1902,

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was passed from her to the borrower by means of her check to the order of Charles F. Richardson indorsed by him to the order of Howe and French, and the amount of the check was entered by the bookkeeper on the cash book, "Charles F. Richardson, loan account, Sarah Richardson, $3,000." There was on the books an account headed "Charles F. Richardson, Manager, account," to which such sums as he drew from the business of Howe and French for his personal use were charged. The first entry in this account was made October 31, 1901, and was a credit of $5,741.99, representing the amount found to be due him at the decease of John C. Howe as compensation to that time, taking into account salary and profits. Upon the ledger of Howe and French the $3,000 received from Sarah Richardson's check of September 23, 1902, was carried to the credit side of this account. The note of the same date intended to represent the debt was however made out at the same time and by the same bookkeeper, and ran to the order of Sarah Richardson. The check of December 23, 1902, by which Howe and French received the second loan, was drawn to the order of Howe and French, was carried to the credit of the same ledger account, and the note drawn by the bookkeeper to represent the loan was dated December 24, and ran to "the order of Chas. F. Richardson, % loan Sarah Richardson."

The checks of March 3, 1903, and of April 10, 1903, were each drawn to the order of Howe and French, and the corresponding notes were drawn payable to the order of Sarah Richardson, but in each case the sum represented by the check was carried to the same ledger account with the previous loans. For some reason no credits for the services or profits of Charles F. Richardson as manager were carried to this account between October 31, 1901, and the time when the business was sold, so that at that time the balancing of that account showed a net credit less than the sum of Sarah Richardson's loans. Sarah Richardson had not at that time asked for or received any interest on her loans. She had in fact never seen any of the notes, which were kept for her by Charles F. Richardson, her son, in a safety deposit box of his own in which he kept for his mother her securities, keeping his own in the same box. She never saw or had in manual possession in her own hands the notes until

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after the sale of the business of Howe and French to the present owners.

If the facts had been that Sarah Richardson had made the loans to her son upon his credit, and that in turn he had placed the money so acquired as his own to the credit of his own account as manager of the Howe and French business as a loan from himself and had drawn against the account as showing an indebtedness due to himself, and that after the sale he in bad faith had pretended that the loans were made not to himself but to the executors, and had then to work a fraud placed the notes in his mother's hands, the case would stand very differently. So in some degree it would stand differently if the loans having been intended by his mother as made to the executors, the son had in bad faith falsely pretended that they were made by him as an individual. In either of those cases it might be necessary to examine how far Sarah Richardson should be charged with his knowledge. So if the only ground for a liability on the part of the executors for debts incurred in prosecuting the business of Howe and French had been the written instrument of November 6, 1901, it might be necessary to inquire, under the doctrine of *Grafton National Bank* v. *Wing*, 172 Mass. 513, whether the executors were personally liable because of that instrument. But the findings of fact already recited, supported by the reported evidence, make all these considerations immaterial, and show that there was no error in the dealing of the justice who entered the decree, either with the requests for findings or for rulings. We assume that upon the performance of the decree the notes will be delivered up.

Decree affirmed.

M. Storey & R. D. Weston-Smith, for Mabel Y. Howe and others.

J. H. Benton, Jr., (*W. L. Quimby* with him,) for Sarah Richardson.

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WILLIAM R. SLADE, administrator, *vs.* WILLIAM H. BEATTIE & another.

Bristol. January 11, 1904. — June 24, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Negligence, Employer's liability.

If a workman assisting in hoisting loads of lumber in a building in process of construction, who has been told by the foreman in charge always to keep from under the load and never to go under it, is called to the floor above while a load is being hoisted to assist in unloading it, and on his way to the ladder leading to the floor above unnecessarily passes under the load, the ladder being otherwise accessible, and is injured by the falling of the load upon him owing to the breaking of the hook of the hoisting chain, he either is not in the exercise of due care or voluntarily assumes the risk of injury, and if his injuries result in death, his administrator cannot recover against his employer.

TORT for the conscious suffering and death of the plaintiff's intestate alleged to have been caused by a load of lumber falling upon him from the giving way of a defective hoisting apparatus maintained by the defendants, who were contractors engaged in building a two story structure on Goat Island in the harbor of Newport in the State of Rhode Island, by whom the plaintiff's intestate was employed. Writ dated December 17, 1901.

In the Superior Court *Fox*, J. ruled that upon all the evidence, whether the law of Rhode Island or the law of the United States applied, the plaintiff could recover neither for the conscious suffering nor the death of the intestate, and ordered a verdict for the defendants. At the request of the parties the judge reported the case for determination by this court. If the ruling that the plaintiff could not recover for either the conscious suffering or the death of the intestate was right, the verdict was to stand; otherwise, the verdict was to be set aside, and a new trial ordered.

J. W. Cummings, (*C. R. Cummings* with him,) for the plaintiff.

R. P. Borden, (*R. C. Davis* with him,) for the defendants.

BRALEY, J. It was admitted at the trial that there was evidence which tended to prove negligence on the part of the

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defendants, in not furnishing their servant, the plaintiff's intestate, reasonably safe and proper appliances with which to do his work; and the principal question raised by the report arises under the ruling that there could be no recovery either for his conscious suffering or death, because, at the time when he received the injuries from which he suffered and ultimately died, he was negligent and assumed the risk that the load of lumber under which he was passing might fall upon him. He had helped in binding the planks, and in guiding them while they were being hoisted from the first to the second floor of the building in process of construction and where he was at work, and when the load was in place and being raised, he was called by a fellow servant to come to the second floor and help to unload it. In order to pass from one floor to the other, it was necessary to use one of two ladders that were presumably in position at the south end of the opening between the floors, although spoken of in the report as at the south end of the "load." At this time he was at the north end of the opening or of the load, which had been raised to the height of about eight feet, and as he passed under it, on his way to the ladder, the hook or claw of the hoisting chain gave way and the planks fell, causing his injuries and death.

The work was being done under the direction and in the presence of the foreman of the defendants, who previously to the accident had told the plaintiff's intestate "always to keep out from under the load," and "never go under the load"; and the uncontradicted evidence shows that the prosecution of the work did not require him to pass under the planks, and that either ladder was accessible by a way that did not necessitate his exposure to the possibility of personal injury.

Upon these facts it is clear that he was not obliged, in the discharge of his duties, to put himself in a place of obvious danger, while passing from where he stood, at the time he was called, to the ladder that led to the second floor, when he must have known that the load was suspended above him, and must have realized, as a matter of common prudence, that to stand or to pass under it might be attended with danger.

In addition to what his own sense of due care should have suggested, he had been warned that in doing his work he should

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not put himself in the situation he was in when injured, and whether it be put on the ground of negligence on his part or on that of assumption of risk, it must be held that, in deliberately placing himself in the position in which he was hurt, he either was careless or took the chance of what finally happened.

The plaintiff, to meet this aspect of the case, contends that it cannot be said, as matter of law, that for a workman, while attending to the duties of his employment and in the prosecution of his work, to stand or be where a suspended body or weight may fall upon him, is negligence. And it has been so decided. *Spicer* v. *South Boston Iron Co.* 138 Mass. 426. *Graham* v. *Badger*, 164 Mass. 42. *Haskell* v. *Cape Ann Anchor Works*, 178 Mass. 485.

But there is a distinct difference in principle between a case where a servant, in the discharge of his duty of service and using the ways, works and machinery furnished him by the master, is obliged to pass and repass under objects that are being made or used in the business and which may fall upon and injure him, and the case at bar, where the employee could do his work in his own way and was not obliged, while in its performance, to expose himself to such risks. *Lynch* v. *Allyn*, 160 Mass. 248, 253. *Kilroy* v. *Foss*, 161 Mass. 138.

As the ruling on this part of the case was right it is enough to support the verdict, and no useful purpose would be served by a discussion of the other important questions disclosed by the record and argued at the bar.

Verdict for the defendants to stand.

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ORIN E. SANDS & others *vs.* NUNZIATA MELCHIONDA & another.

Suffolk. January 20, 1904. — June 24, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY JJ.

Guaranty.

Under a guaranty in writing by which the guarantor agrees to be responsible to the promisee for the price of goods sold by him to a certain other person to an amount named, and expressly waives notice of the sale of any goods under the guaranty and also waives any demand on the purchaser for payment, the guarantor is liable on his promise without notice of the purchaser's failure to pay for goods sold to him under the guaranty.

CONTRACT on a guaranty in writing. Writ dated April 15, 1901.

At the trial in the Superior Court before *Sherman*, J., without a jury, the judge refused certain requests of the defendants stated in the opinion, and found for the plaintiffs in the sum of $822.97. The defendants alleged exceptions.

The contract sued upon was as follows:

"Know all men by these presents that we, Prisco Melchionda and Nunziata Melchionda, wife of the said Prisco, in consideration of one dollar to each of us paid by O. E. Sands, M. C. Taylor and G. E. Wood, under the firm name and style of Sands, Taylor & Wood, having their usual place of business at Boston, in the County of Suffolk and Commonwealth of Massachusetts, in consideration that they shall sell to Crescenzio Jannini of said Boston, such goods as he may from time to time order, we each of us hereby guarantee to said Sands, Taylor & Wood the payment of the price of all such goods sold to said Crescenzio Jannini by said Sands, Taylor & Wood.

"This agreement is a continuing guaranty and is to be in full force and effect to the amount of one thousand dollars at any one time until revoked by us in written notice delivered to said Sands, Taylor & Wood, and we each of us do hereby waive any notice to us or either of us of the sale of any goods made under this guaranty, and also waive any demand on the purchaser for the payment thereof.

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"We also agree that this guaranty shall not be affected by the taking of any note or other obligation for the payment of such goods sold to said Crescenzio Jannini by said Sands, Taylor & Wood, or by their taking any credit for such payment.

"In witness whereof we have hereunto set our hands and seals this tenth day of July, A. D. 1899.

"Prisco $\overset{\text{his}}{\underset{\text{mark}}{\times}}$ Melchionda. [Seal]

"Witness:
"Crescenzio Jannini.
Fred J. Parsons.
Stefano Clemente.
Ettore D'Amelia."

Nunziata $\overset{\text{her}}{\underset{\text{mark}}{\times}}$ Melchionda. [Seal]

W. S. Campbell, for the plaintiffs.

W. M. Stockbridge, for the defendants.

LATHROP, J. This is an action on a guaranty in writing, signed by the defendants by their marks, by the terms of which the defendants agreed to be responsible to the plaintiffs for the price of goods to be sold by the plaintiffs to one Jannini, to the amount of $1,000. At the trial in the Superior Court, without a jury, it appeared that goods were sold to Jannini, and the judge found for the plaintiffs in the sum of $822.97; and the case is before us on the defendants' exceptions to the refusal of the judge to give certain rulings requested. We will consider these in their order.

1. The first request for a ruling was as follows: "The evidence is not sufficient to warrant a finding that the defendants or either of them assented to or intended to be bound by the terms of the written instrument."

The trial before the judge of the Superior Court clearly appears from the exceptions to have been on this point a question of fact merely. The plaintiffs' evidence tended to show that the last named defendant, before signing the instrument, was asked if he knew the purport, and was told that it was a guaranty to furnish to Jannini goods to the amount of $1,000, to which he replied that he so understood, and thereupon affixed his mark. The instrument was then delivered to Jannini to obtain the signature of the first named defendant, the wife of the last named defendant. She called on Jannini and was told by him that her husband knew all about the paper, and that it

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said that she with her husband guaranteed Jannini for $1,000 for the goods which the plaintiffs were to sell to him, Jannini. Thereupon she said: "I know what it is, my husband explained everything to me," and affixed her mark.

It also appeared that the first named defendant was unable to read and write English, and only, with great difficulty, to speak and understand it; and that her husband was able to speak and understand English only with difficulty.

The evidence for the defendants was to the effect that the last named defendant was asked by Jannini if he would guarantee him for goods to be sold him by the plaintiffs to the amount of $200 or $300; that he then went to Taylor and told him that he knew Jannini, that he was all right, and that he would guarantee for $200 or $300; that there was no other interview; and that he did not sign the paper by his mark.

The evidence for the defendants further tended to show that the wife was not asked to sign the guaranty by any one, and did not do so; and that there was no such conversation as was testified to by the witnesses for the plaintiffs.

The finding of the judge shows that he believed the witnesses for the plaintiffs and did not believe those for the defendants, and this finding is conclusive. The defendants' counsel has addressed to us an elaborate argument to show fraud practised upon the defendants. There is nothing in the bill of exceptions to show that any such question was raised or intended to be raised in the court below; and taking the evidence in behalf of the plaintiffs to be true, we see no sufficient evidence of fraud to warrant us, as matter of law, in setting aside the finding of the judge.

2. The second request for instructions is as follows: "Even if the court finds that said written instrument was an obligation binding upon the defendants, nevertheless, it was the duty of the plaintiffs within a reasonable time, after their transactions with said Jannini had closed, to notify the defendants of the amount for which they were held responsible, and failure so to do relieved the defendants from liability under said instrument, so far as they were injured by said failure."

The sales of goods on credit were from July 14, 1899, to August 15, 1899, and none of them was paid for.

It appeared in evidence that the plaintiffs did not at any time

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inform the defendants after their transactions were closed with Jannini on August 15, 1899, of the amount for which they were held responsible prior to the beginning of this action on April 15, 1901, and that the defendants did not know before the beginning of the action that any goods had been sold to Jannini, or that the plaintiffs contended that the defendants were responsible for the price of any goods so sold.

"It further appeared in evidence that after August 15, 1899, the plaintiffs constantly dunned Jannini for payment without success, although he made repeated promises to pay, and that it was by reason of these promises and the request of Jannini to the plaintiffs not to press the bond, that they so long delayed suit. It also appeared that at the time the guaranty was furnished, Jannini had been indebted for one or two years to the plaintiffs in the sum of two or three hundred dollars; that after the goods amounting to seven hundred and thirty-eight dollars, for the price of which this suit is brought, were furnished on the security of the guaranty, Jannini was refused further credit by the plaintiffs, but continued, under the name of the Massachusetts Baking Company, to buy of them for cash or for his customers' notes, until late in December, 1899, after which time, being unable to get cash or its equivalent, he was obliged to stop buying of them, and in the early part of 1900 went out of the baking business, in which he had been engaged for the past seven years, because he had no money to pay expenses, and could not get credit from any one."

By the terms of the contract in this case, the defendants guaranteed to the plaintiffs the payment of the price of such goods as Jannini might order, and which should be sold to him by the plaintiffs. The defendants waived notice of the sale of any goods under the guaranty, and also waived any demand on the purchaser for the price thereof.

We are of opinion that the plaintiffs were not bound to give notice to the defendants of the failure of Jannini to pay for the goods sold to him. *Watertown Ins. Co.* v. *Simmons*, 131 Mass. 85. *Welch* v. *Walsh*, 177 Mass. 555, 559, where this matter is fully discussed.

3. The remaining requests are covered by what has been already said. *Exceptions overruled.*

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CITY OF BOSTON *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 7, 1904. — June 24, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Street Railway. Way, Repair of highway. *Boston Elevated Railway Company. Words*, "Tracks."

In §§ 32, 33 of Pub. Sts. c. 113, requiring street railway companies to keep certain portions of highways in repair, which are still in force as to the Boston Elevated Railway Company, (R. L. c. 112, § 1,) the phrase "occupied by its tracks" means the rails and the space between them over which the cars pass and does not include the space occupied beneath the surface by the sleepers supporting the rails.

MORTON, J. This is an action to recover of the defendant the amount of a judgment obtained by one Findlay against the plaintiff for a defect in Eliot Street, a public highway in Boston, caused by a depression in the pavement between the two tracks of the defendant company outside the rails of the northerly track but within a line drawn parallel with the ends of the sleepers upon which said rails rested. The rails were laid on wooden beams which rested on sleepers embedded in the street. The ties extended outside the rails on each side from eight and one half to ten inches. Eliot Street in the vicinity of the accident was paved from curb to curb with granite blocks.

The case was submitted on agreed facts. Judgment was ordered for the defendant and the plaintiff appealed.

The question is what is meant by the phrase "occupied by its tracks" in §§ 32, 33 of Pub. Sts. c. 113, which are still in force against the defendant company. R. L. c. 112, § 1. The plaintiff contends that it means so much of the surface of the street as lies within lines drawn parallel to the outer ends of the sleepers on which the rails rest. But we think that it means the rails and the space between them on and over which the cars pass. The provision relates to the surface of the streets, not to what is under the surface, and when considered with reference to the surface of the streets we think that it is obvious that this is what the phrase must mean. This is the construc-

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tion which for many years the parties have put upon the statute, and it accords more nearly with the use of the word "tracks" in various provisions of the statutes, such as those relating to the removal of snow, and the use of them, than the construction contended for by the plaintiff. The construction contended for by the plaintiff would make the provision with regard to the repair of unpaved streets eighteen inches on each side the track meaningless and unnecessary.

Judgment affirmed.

S. M. Child, for the plaintiff.

A. P. Stone, for the defendant.

LEMUEL CROSSMAN & another *vs.* CHARLES A. GRIGGS & another.

Norfolk. March 10, 1904. — June 24, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Equity Pleading and Practice, Decree, Costs, Appeal. *Trade Name. Assignment. Equity Jurisdiction*, Equitable mortgage, Equitable attachment.

In a suit in equity an interlocutory decree for the plaintiff appealed from by the defendant should be vacated in spite of the appeal when a final decree is entered dismissing the bill.

Property in a trade name cannot be assigned in gross apart from the business which it designates.

An agreement of a debtor with his creditor that in addition to other security named he will not "sell, dispose of or exchange in any way" his interest in a certain trade name without the consent in writing of the creditor is not an assignment and does not create an equitable mortgage. And the same is true of an agreement that the debtor so long as his indebtedness continues "will not assign, transfer, or sell" the trade name without the consent in writing of the creditor, and that if a certain note is not paid at maturity he will assign and transfer the trade name absolutely to any person named in a written demand of the creditor.

Where a bill is dismissed with costs, a defendant who on his own petition has been admitted as a party erroneously is not entitled to costs.

Whether a debtor's interest in the good will of a business can be reached in a suit of equitable attachment under R. L. c. 159, § 8, cl. 7, *quære*.

Under R. L. c. 159, § 19, an appeal from a final decree in equity stays all proceedings.

LORING, J. Before May 15, 1894, the two plaintiffs, Lemuel and Alfred H. Crossman, together with the defendant Griggs and

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one George H. Bent, were copartners in the business of manufacturing and selling water crackers. On or about May 15, 1894, the plaintiffs conveyed and assigned to Griggs their interest in the real and personal property of the firm, including the good will of the business and the right to use the name "G. H. Bent & Co." in connection therewith. Bent made a similar conveyance and assignment about the same time. The amount due the plaintiffs for this conveyance and assignment was $10,000. At that time the plaintiffs were indorsers on notes given in the partnership business, in the sum of $4,800. They agreed to continue their indorsements until the notes were taken up by Griggs or that sum was paid to them by him. These notes ultimately were taken up by the plaintiffs. On the same day, May 15, 1894, Griggs conveyed to the plaintiffs the land on which the bake shop was situated in which the business of the firm was carried on, and the plaintiffs gave Griggs a bond to reconvey the land conveyed upon payment of the $14,800 aforesaid, with interest at six per cent per annum. Also on the same day and as part of the same transaction, Griggs executed and delivered to the plaintiffs a paper in which after reciting the debt of $14,800, the deed, the bond and the fact that he was "the owner of the name or trademark of 'G. H. Bent & Co.' formerly owned by said Lemuel Crossman, A. H. Crossman, George H. Bent and myself doing business as G. H. Bent & Co.," Griggs agreed "in addition to the security above mentioned not to sell, dispose of or exchange in any way my interest in the name or trademark of 'G. H. Bent & Co.' without their consent in writing being first obtained until said sum of fourteen thousand eight hundred dollars shall be paid to said Lemuel and A. H. Crossman with interest."

On August 30, 1898, the plaintiffs brought a bill against Griggs alleging these facts, and on March 8, 1899, a decree was entered declaring that Griggs owed the plaintiffs $20,830.21, of which sum $17,470.80 was secured by an equitable mortgage upon the real estate, and "upon the name or trademark G. H. Bent & Co.," and the balance, $3,359.41, was unsecured, directing the real estate and the name and trademark to be sold as an entirety, and appointing a commissioner to conduct the sale. From this decree Griggs took an appeal

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on March 10, 1899. On March 16, 1899, one Ewen R. McPherson filed a petition in the above cause in the Superior Court, alleging that Griggs was indebted to him in the sum of $3,000, and that on May 17, 1894, he executed "an assignment in pledge of the name or trademark 'G. H. Bent & Co.'", that the petitioner had "no knowledge of the alleged rights of the plaintiffs in said name or trademark or of the proceedings in said cause until after the final hearing"; and praying that he be admitted a party, that the "decree may be vacated or modified to protect" his rights in said name or trademark, and for general relief. Annexed to this petition is a paper in which it is recited that Griggs is indebted to McPherson in the sum of $3,000, that Griggs is "the owner of the name or trademark 'G. H. Bent & Co.' formerly belonging to Lemuel Crossman, A. H. Crossman, George H. Bent, and myself doing business under the firm name of G. H. Bent & Co., which firm is now dissolved"; and thereupon Griggs covenants with McPherson "that so long as my said indebtedness to said E. R. McPherson shall continue unpaid I will not assign, transfer, or sell said name or trademark to any person or persons without having first obtained the consent in writing of said E. R. McPherson. And I hereby further covenant that in case my said note shall not be fully paid and discharged at maturity, four months after the date thereof as aforesaid, then I will upon the written demand of said E. R. McPherson assign and transfer said name or trademark absolutely to any person or persons whom the said E. R. McPherson shall designate in such written demand. And it is hereby agreed that in case of failure as aforesaid to discharge the said note at maturity, then at any time after such failure the said E. R. McPherson may assign his rights under and by virtue of this instrument and the covenants by me therein contained shall be binding upon me in the hands of such assignees."

On a motion filed by Griggs on April 20, an order was made dated April 18, directing the commissioner to adjourn the sale until further order of the court. From this order the plaintiffs appealed. On May 2 the following order, dated April 29, 1899, and indorsed on the back of McPherson's petition, was filed: "The within named petitioner, Ewen R. McPherson, is hereby admitted as a party to the above named cause." From this

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order the plaintiffs appealed. On May 2, an order dated April 29, 1899, was filed, in which it is stated that the judge was of opinion "that the decree entered in this case March 8, 1899, so far affects the merits of the controversy that the matter ought to be determined by the Supreme Judicial Court before further proceedings are had thereunder; it is therefore ordered, that all further proceedings thereunder be stayed pending the appeal of the defendants from said decree"; and from this order an appeal was taken by the plaintiffs.

On May 8, 1899, the plaintiffs filed a bill of exceptions, which was allowed on June 9, 1899. This stated exceptions to the order of April 20, 1899, adjourning the sale, and to the order of May 2, 1899, staying all further proceedings under the decree of March 8, 1899. On December 4, 1899, a rescript was sent down by this court, "Appeal dismissed as prematurely entered."

On January 2, 1900, Griggs filed an answer to McPherson's petition, and a "decree" was entered January 4, 1900, in which McPherson was made a party defendant and ordered to answer the bill on or before January 19, 1900. From this the plaintiffs appealed. On January 19, 1900, McPherson filed a demurrer and answer; on March 20 the plaintiffs filed motions to strike out this demurrer and answer, which motions were denied and the plaintiffs appealed. Thereupon the plaintiffs joined issue and the case was heard on the merits. The judge found that the real estate conveyed May 15, 1894, by Griggs was conveyed as security for payment of the $14,800, and that "as a part of the same transaction on May 15, 1894, the defendant Griggs executed the agreement set forth in Exhibit A with reference to the sale, disposition or exchange of the name or trademark of 'G. H. Bent & Co.' As I construe such last agreement, I rule as a matter of law that it conveys no interest in such trademark or name by grant or assignment or declaration of trust, to the plaintiffs. It confers upon the plaintiffs no equitable lien. I therefore rule that the plaintiffs have no claim as mortgagees, equitable or otherwise, in the trademark or name of 'G. H. Bent & Co.'" The judge also found "that the real estate conveyed by the mortgage . . . was the land occupied and used in the business of G. H. Bent & Co. previous to May 15, 1894, but that such mortgage and agreement . . . did not expressly

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or impliedly convey to the plaintiff the personal property, the business or the good will of the business. Upon such construction of the mortgage under the decision of *Hallowell* v. *Ames*, 165 Mass. 123, as recognized in *Old Colony Trust Co.* v. *Great White Spirit Co.* 178 Mass. 92, I rule that this court has no jurisdiction in equity under the fourth prayer in the bill." He further made this finding: "It appears that in the agreement Exhibit A and the agreement of the defendant Griggs with the defendant McPherson, dated May 17, 1894, there has been no attempt expressly or by implication to convey to or declare a trust in favor of either the plaintiffs or McPherson in the business or the good will of the business of Griggs. It is simply an agreement about the trademark or name of the business or the good will attached to the said name or trademark. The agreement with McPherson of May 17, 1894, if not an assignment of the trademark, is in my opinion a declaration of trust in favor of the defendant McPherson, which might confer an equitable lien, if the trademark could be granted in gross without reference to any business to which it may be incident. The plaintiffs as well as the defendant McPherson seem to claim an equitable attachment or an interest in the trademark apart from the business or the good will of the business or anything else which carries with it property in a trademark. If trademarks and trade names are not as such, property, and cannot be transferred or alienated in any way, I must rule that the plaintiffs are not entitled to relief under the second prayer in the bill, if they claim thereby to enforce by sale an equitable attachment."

Thereupon a final decree was entered "that the plaintiffs' bill be dismissed with costs to both defendants." From that decree the plaintiffs appeal. The evidence was taken at both hearings by a commissioner, and is now before us.

The Superior Court seems to have treated as an interlocutory decree the decree of March 8, 1899, establishing two debts due to the plaintiffs, one secured and one unsecured; and establishing the existence of an equitable mortgage on the real estate and the trade name as security for the secured debt. For that reason it seems to have been assumed that the appeal did not stay all proceedings under that decree, and also that it was open to that court to admit McPherson as a party in the cause in

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spite of the appeal to the full court. This court seems to have assumed that McPherson had been admitted properly as a party, and for that reason that the appeal was prematurely entered here. After the rescript it was the duty of the Superior Court to deal with McPherson as a party. But if the decree of March 8, 1899, was an interlocutory decree, it should have been vacated in spite of the appeal, when the decree of December 14, 1903, was made dismissing the bill.

In the agreement with the plaintiffs dated May 15, 1894, and in that with McPherson dated May 16, both Griggs on the one hand and the plaintiffs and McPherson on the other hand seem to have assumed that "the name or trademark of G. H. Bent & Co." was property which could be assigned in gross. That was a mistake. The reasons are stated at length in *Chadwick* v. *Covell*, 151 Mass. 190, and need not be repeated here. See also *Covell* v. *Chadwick*, 153 Mass. 263; *Messer* v. *The Fadettes*, 168 Mass. 140.

The plaintiffs' contention is that an assignment of a trade name is a good assignment when it is coupled with a conveyance of the factory where the partnership business is carried on, and that in the case at bar the two were in fact one transaction. Whether that is so or not need not be considered, for Griggs, in the paper given by him to the plaintiffs, did no more than to agree not to sell, dispose of, or exchange in any way his interest in the name or trademark of G. H. Bent & Co. without the consent of the plaintiffs first being obtained. This is not in terms an assignment and is not in our opinion to be construed to mean more than its terms import. That disposes of the plaintiffs' argument as to his having an equitable mortgage in analogy to such a mortgage by deposit of title deeds.

In the agreement with McPherson there is an intention to assign the name or trademark but there is in terms no assignment of the good will of the business, and in our opinion that agreement also cannot be construed to mean more than its terms import. In our opinion it cannot be construed to be an implied assignment of the good will of the business. For that reason it gave McPherson no rights of property in the name or trademark in question. All that McPherson got was a right to bring an action of contract against Griggs for damages, in case Griggs broke his agreement.

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For these reasons this bill so far as it is a bill to enforce an equitable mortgage to secure the debt of $17,470.80 must be dismissed.

By the final decree entered on December 14, 1903, the bill was dismissed with costs "to both defendants." In our opinion McPherson's petition to be admitted a party defendant should not have been granted, and, for that reason at least, he is not entitled to costs.

By the construction which we have given to the Griggs agreement delivered to McPherson, dated May 16, 1894, McPherson obtained no right of property in the name and trademark G. H. Bent & Co. All that he got was a right to recover damages against Griggs if Griggs broke his promise not to assign the name and trademark to another or if he broke his promise that he would assign it to McPherson or his assignee on a written demand being made upon him so to do. Whether McPherson's petition to be allowed to become a party defendant should or should not be granted depended upon his having a property interest in the name or trademark in question. If he had such an interest he had a right to be admitted a party defendant to protect that interest. If he had not a property interest in the name but only a right of action for damages for breach of a contract made with him by Griggs in case he did not get the trademark, he had no standing as a party defendant in a bill in which it is sought to have the trade name owned by Griggs applied in payment of a debt for which the plaintiff contends it was pledged, or in a bill in which it is sought to have it applied in payment of a debt for which it is not pledged as property which cannot be taken on execution at law. How far this bill is to be treated as a bill of the latter kind will be dealt with later on. The time for deciding whether McPherson did or did not have a property interest in the name was when his motion to be admitted a party defendant came on to be heard.

The plaintiffs have not argued that under the present bill the good will of the business of G. H. Bent & Co. can be reached and applied in payment of the plaintiffs' debt apart from the validity of their claim that the mortgage of the real estate and the agreement of May 15 constituted an equitable mortgage on the business. They have contended that out of the balance

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of the proceeds of the sale of the real estate and trade name as an entirety made under the equitable mortgages of them, they are entitled to have their unsecured debt paid if there is a balance of those proceeds after the secured debt is paid out of them. It is not necessary to consider whether the plaintiffs could have the good will of this business sold and the proceeds applied to the payment of the debt due the plaintiffs apart from their having an equitable mortgage. In connection with which see *Walker* v. *Mottram*, 19 Ch. D. 355; *Cruttwell* v. *Lye*, 17 Ves. 335, and also *Moore* v. *Rawson*, 185 Mass. 264; *Hutchinson* v. *Nay*, 183 Mass. 355.

The only question presented by the bill of exceptions is whether further proceedings under the decree of March 8, 1899, should have been stayed. If that was a final decree, further proceedings were stayed by the appeal. R. L. c. 159, § 19. If not, it was proper that they should be stayed. The exceptions are for this reason immaterial.

The entry must be

Decree of March 8, 1899, vacated. Bill dismissed with costs to the defendant Griggs. Exceptions overruled.

G. R. Nutter, (*J. B. Studley* with him,) for the plaintiffs.

S. C. Darling & P. B. Runyan, for the defendant Griggs, submitted a brief.

W. A. Munroe, for the defendant McPherson.

THOMAS MANNING *vs.* CHARLES BRUCE & others.

Middlesex. May 19, 1904. — June 24, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Everett. Eminent Domain. Constitutional Law. Municipal Corporations. Nuisance. Evidence, Presumptions and burden of proof.

The taking by the city of Everett under St. 1902, c. 465, of certain land in that city for a hospital for the treatment of contagious diseases is valid.

When land is taken under statutory authority, if the owner chooses to waive irregularities in the taking and accepts payment in damages, the taking becomes good as to him; and *semble* that no one else can take advantage of the irregularities.

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St. 1902, c. 465, authorizing the city of Everett to take land for a hospital for the treatment of contagious diseases, is constitutional.

A statute authorizing a city to take land for a hospital for the treatment of contagious diseases, although an exercise of the right of eminent domain so far as it affects the owner of the land taken, is in its general purpose an exercise of the police power for the protection of the public health.

In this Commonwealth a city has authority without special legislation to erect a hospital for the treatment of contagious diseases on land purchased for the purpose.

A hospital erected by a city for the treatment of contagious diseases is by R. L. c. 75, § 40, under the supervision of the board of health, and in the absence of proof will not be presumed to be a nuisance public or private.

BILL IN EQUITY, filed August 28, 1902, by an owner of land and a dwelling house in Everett against the mayor and the members of the board of health of that city, to restrain them from erecting and maintaining a hospital on land adjoining that of the plaintiff for the care of persons suffering from smallpox and other contagious diseases.

In the Superior Court *Hardy*, J. made a decree dismissing the bill with costs; and the plaintiff appealed.

F. P. Curran, for the plaintiff.

W. S. Thompson, for the defendants.

HAMMOND, J. 1. The defendants rely upon St. 1902, c. 465, for their justification. The first contention of the plaintiff is that the alleged taking of the land for a hospital is invalid because the provisions of the statute were not complied with in that the taking was by the mayor and not by the city. The statute (§ 1) provided that "the city of Everett by its city council may take any lands within the limits of said city" for the erection of a hospital for the care of persons suffering from contagious diseases, and that (§ 2) "within sixty days after the taking of any land . . . the city council shall cause to be recorded in the registry of deeds . . . a description thereof sufficiently accurate for identification, with a statement of the purpose for which the same was taken, which statement shall be signed by the mayor of the city"; and thereupon the fee in the land vests in the city. The vote of the city council, approved July 22, 1902, after reciting the fact that by this statute the city had been authorized to take land for the purposes therein named, ordered that "the mayor be and he is hereby authorized and instructed for and in behalf of the city

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of Everett by virtue of said act of the Legislature to take" for the purposes therein named, certain land now or formerly of one Bradley, which in the order is minutely described by metes and bounds. Another order passed at the same time authorizes the mayor "to cause any buildings on estate of Bradley taken by the city of Everett for hospital purposes to be vacated within six days from the date of the approval of the order taking said land by the mayor." The last three words in the order manifestly refer to the word "approval" and not to the word "taking" as though the clause read "approval by the mayor of the order taking said land." We do not find in the record any copy of the statement which was signed by the mayor and seasonably filed in the registry, but there is a copy in the brief of the defendants, and, as we do not understand that its accuracy is questioned, we assume it to be correct.

This statement, after reciting that by virtue of the St. of 1902, c. 465, "and by an order passed by its city council and approved by its mayor July 22, 1902," (which is the order first above mentioned) the city of Everett "did duly take the lands . . . hereinafter described," for hospital purposes, proceeds as follows: "Now therefore, the said city of Everett, by and through its mayor, . . . does . . . hereby file . . . the following description of the lands so taken." Then follows an accurate description of the land named in the order of the city council. The statement is signed "Chas. Bruce, Mayor of Everett," and to it is affixed the city seal.

From an inspection of these papers it is clear that, while the order of the city council is not in the best form, nothing was left to the discretion of the mayor; that the taking was made by the order of the city council, and that the duty of the mayor which he was instructed to perform was to sign and file, in behalf of the city, the statement required by the second section of the statute. The taking was in compliance with the statute. We have passed upon the question of its validity, although it is difficult to see how any one except the person whose land was taken can take advantage of any irregularities. If the landowner chooses to waive the irregularities in the taking and to accept payment of the damages, it is a good taking certainly as to him.

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2. Nor is the statute unconstitutional. While, so far as it affects the owner of property taken, it is an act in the exercise of the right of eminent domain, it is nevertheless in the object ultimately to be reached an act in the interest of the public health, and, so far as it confers the right to erect and maintain upon the land taken a hospital for contagious diseases, it finds its sanction in the general police power, subject to the proper exercise of which all property is held. It is not necessary to discuss the right to deal with contagious diseases. Even the right of personal liberty must yield to the measures necessary for the protection of the general public. A man afflicted with the smallpox, or any other contagious disease dangerous to public health, has for the time being lost his right of personal freedom, and may be compelled to yield to restraint carried, if necessary, even to compulsory isolation. Hospitals must be established and maintained for such persons, and for more than a century cities and towns have been authorized by statute to do this; and, in case of the breaking out of a contagious disease dangerous to the public health, it is made the duty of the proper public officer to provide a hospital or place of reception. St. 1792, c. 58, §§ 2, 5. Rev. Sts. c. 21, §§ 35–40. Gen. Sts. c. 26, §§ 40–44. Pub. Sts. c. 80, §§ 70–75. R. L. c. 75, §§ 35–42. Such laws being necessary for the protection of the public health, are wholesome and reasonable within the meaning of the phrase as used in the Constitution, and they violate no constitutional provision. See *Sawyer* v. *Davis*, 136 Mass. 239, and cases there cited, for discussion of the subject. Under the general law the city could have erected such a hospital, but it was limited to such land as it could buy, and no doubt this statute was passed not so much to grant authority to build and maintain a hospital as to enable the city to obtain a site for it by the exercise of the right of eminent domain. Such a hospital is under the supervision of the board of health, (R. L. c. 75, § 40,) and it is not to be assumed in advance that it will be a nuisance, public or private. The findings of the master do not show any ground for interference with its erection.

Decree affirmed.

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COMMONWEALTH *vs.* CITY OF NEWTON & another.

Middlesex. May 19, 1904. — June 24, 1904.

Present: MORTON, LATHROP, HAMMOND, & LORING, JJ.

Municipal Corporations. Way. Res Judicata.

If the metropolitan park commissioners by a mistake unlawfully fill in an old archway under a highway thus stopping the flow of a branch of a river, and the city maintaining the highway, assuming that it has a right to place solid construction across this branch of the river, adopts the filling put there by the park commissioners and completes the street upon it, it becomes the duty of the city to remove the filling from the archway and construct the necessary culvert.

Where the Commonwealth as against a city has the right to have the city remove the filling from a certain old archway under a highway and construct a culvert there, and seeks to enforce this right in a suit in equity in which a certain manufacturing corporation properly is joined as a defendant, the fact, that the corporation is precluded, by a decree in a former suit brought against the metropolitan park commissioners for damages, from maintaining that the city should construct the culvert, is no defence for the city as against the Commonwealth whose claim against the city was not involved in the former suit.

LORING, J. This suit is before this court on a report made by a judge of the Superior Court.

From that report it appears that by a taking made by the metropolitan park commissioners in 1895, both sides of the Charles River south of Boylston Street, shown on the plan accompanying the report, had been taken for a public park. Thereupon the commissioners proceeded to dam up the east branch. In consequence a bill was brought by the Newton Rubber Works, which owned land on both sides of the east branch lower down the river and on the north of Boylston Street, to enjoin the commissioners from continuing this obstruction, and a final decree dated March 5, 1903, was made by the Superior Court, by which it was "ordered, adjudged and decreed that the East Branch of the Charles River be opened up and put in its original condition, and that the Metropolitan Park Commissioners remove the dam at the opening of the East Branch, if still existing, and all other obstructions within the limits of the ownership of the Commonwealth which would prevent the free and natural flow of water down said East Branch." The city of Newton was made a party

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defendant after the bill was brought, and "as against the city of Newton the bill was dismissed."

The report then states that the park commissioners, acting under said decree, "excavated a channel on said East Branch and . . . removed all obstructions on said East Branch within the limits of the Commonwealth's ownership which would interfere with the free and natural flow of the water, with the exception of a bank of earth at the upper end of said channel and a sheathing of boards on the line of said Boylston Street, which was constructed to prevent the said street from falling in."

The east branch formerly flowed under Boylston Street, which was laid out by the county commissioners as a county road in 1832. A stone arch was built for the river "sixty or seventy years ago, which has not been since altered and stands to-day in the same condition as when built."

After the commissioners had removed from the land of the Commonwealth all the filling put in by them except a bank of earth at the entrance of the east branch and the bulkhead to keep Boylston Street from falling in, they brought this bill (on June 11, 1903) setting forth that they had in good faith but without right, as it had since been decreed, dammed up the east branch; that they had been directed to remove all obstructions within the limits of the ownership of the Commonwealth which would interfere with the free and natural flow of the water, and that acting under this order they had done so, with the exception of a bank of earth at the upper end of said channel and a wooden bulkhead on the line of the said Boylston Street, which has been "constructed to prevent the said street from falling in." They then allege that they are ready and willing to remove the final obstructions and let in the water as soon as they can safely do so, but that they are prevented by obstructions placed in the original channel by the city of Newton and the rubber works; and they pray that the city of Newton and the rubber works be ordered to remove these obstructions.

The judge of the Superior Court found that "with the exception of the bank of earth near the upper end and the sheathing of boards at the lower end, the Metropolitan Park Commissioners have complied in a reasonable manner with the decree and removed all obstructions within the limits of the Common-

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wealth's ownership to the free and natural flow of water down said East Branch," and that "the commissioners are ready and willing to complete the excavations so soon as the culvert under Boylston Street is completed and the obstructions below removed." He ruled that the bulkhead of the rubber works was an unlawful obstruction, but refused to rule that Boylston Street, as at present constructed, unlawfully obstructs the east branch, and that the Commonwealth is entitled to a decree ordering the city of Newton to complete the culvert under Boylston Street. At the request of the city of Newton he ruled that the city should not be required to be at the expense of opening that part of Boylston Street where the channel was filled by the Commonwealth, and that "the decree in the former case is decisive for the city in this case." There were other rulings, but these raise the questions argued here.

The report ends as follows: "I suspended the decree in the former case, so far as to prevent the Metropolitan Park Commissioners from being held in contempt for non-compliance with the full terms of the decree until the further order of the court.

"I ruled that the complainant was entitled to a decree as against the respondent, the Newton Rubber Works, requiring it to remove the dam or bulkhead referred to in the bill, and that as against the city of Newton the bill should be dismissed.

"And now, at the request of the parties, I report the case upon the pleadings and the above findings for the determination of the Supreme Judicial Court, such decree to be entered as justice requires."

It appears from the report that the rubber works conveyed all its property to the International Automobile and Vehicle Tire Company on May 1, 1899.

It is plain that the bill must be amended by substituting the International Automobile and Vehicle Tire Company as a party defendant in place of the Newton Rubber Works. We construe the agreement which has been made between the parties to the suit as an agreement that this may be done and that the suit may proceed as if it had been done. Although irregular, we proceed on this basis.

It would seem that the principal difference between the par-

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ties is the expense of constructing the culvert under Boylston Street.

From the report it appears that the situation in that connection is this: Before the filling made by the park commissioners in the east branch, Boylston Street was not wrought for travel for the whole width of its location on the south side of the road. It seems to have been located fifty feet wide and to have been wrought for travel thirty-seven or thirty-eight feet wide. The east branch at that time ran under Boylston Street through the "stone arch built sixty or seventy years ago," already spoken of. The park commissioners, in filling in the east branch in 1896, not only filled in the channel on the land of the Commonwealth but also filled in that portion of the channel within the location of Boylston Street outside of the constructed roadway, thus blocking up the archway.

It is stated in the report that "with regard to this filling, the street commissioner of Newton testified that it was done with the consent of the city, that it simply saved the city the expense of so much filling, and that afterwards the city filled in on top of it, in connection with the work of completing this part of the street." The judge found that after twelve or thirteen feet in width of Boylston Street had been filled in by the park commissioners, "the city subsequently put in more filling on top as aforesaid and completed the construction of the street in this place." When the city of Newton made use of the filling put in by the park commissioners and made it part of Boylston Street does not appear. It does appear that in January, 1902, Boylston Street was widened on the north side thirty feet, by an order of the board of aldermen of Newton, approved by the mayor. So far as this thirty feet is concerned, a space has been left "sufficient to carry such water as may come through the old archway or culvert."

Had there been no filling against the old archway, it would have been the duty of the city to lengthen out the arch or otherwise provide for the east branch flowing under Boylston Street, when it elected to construct a wrought surface to the full width of the location of Boylston Street on the south. *Perry* v. *Worcester*, 6 Gray, 544. See also *Lawrence* v. *Fairhaven*, 5 Gray, 110; *Parker* v. *Lowell*, 11 Gray, 353.

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Had the city of Newton, when it widened the wrought surface of Boylston Street on the south side, notified the park commissioners to remove the filling they had put within the limits of Boylston Street, the commissioners would have been bound to do so in order that the city might build the proper culvert for the east branch. At that time the city seems to have assumed that it had the right, in widening Boylston Street, to make a solid construction across the east branch; and it adopted the filling put there by the commissioners and completed the street on top of it. By such adoption the filling became as much the filling of the city as if it originally had been put there by it; and it is now the duty of the city to remove it and to construct the necessary culvert.

This brings us to the "ruling" of the judge of the Superior Court that "The decree in the former case is decisive for the city in this case."

The former case here referred to is the case of *Newton Rubber Works* v. *de las Casas*, 182 Mass. 436. That case was before this court on an appeal by the plaintiff corporation from a decree sustaining the exceptions to the master's report of the defendant as to the damages which the plaintiff corporation was entitled to recover, and overruling an exception taken by the plaintiff to the report, which had nothing to do with the plaintiff's case against the city of Newton.

The difficulty we have in dealing with the ruling that the former case is decisive here is that the record of the former case is not made a part of the report in this case.

But from what is stated in the brief of the Commonwealth it would seem that no cross-bill was filed in that suit to settle the rights between the defendants therein, and we find nothing in the briefs of the other parties to the contrary. We shall assume that to be the fact. Had the right of the Commonwealth to have the city construct the necessary culvert in case the tire company was successful in its claim as to the east branch been in issue there, it could not now litigate that question anew. But if it be assumed that under the agreement between the parties the tire company is entitled to the same rights on the question of *res judicata* as it would have if it had (as it ought to have) been made the party plaintiff in the former suit, and if it be

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assumed that the Commonwealth is estopped by the decree against the park commissioners who were sued as wrongdoers, all that is *res judicata* is that, as between the tire company and the city, the tire company is not entitled to have the city construct this culvert. If the bill in the present suit were a bill merely in aid of the former decree to enable the park commissioners to carry into effect their duty under that decree, there would be good ground for holding that the former decree was decisive here.

But we are of opinion that the present bill must be taken to be an independent bill by the Commonwealth to have the east branch flow through its former channel under Boylston Street, as it now seems it ought to flow. The fact that the rubber works or the tire company failed to secure a decree against the city to have the culvert built, although it was entitled to it, does not prevent the Commonwealth from asserting its right to have the city construct the necessary arch or culvert. In the former suit the right of the tire company to have the city build this culvert was raised, but the right of the Commonwealth to have the arch or culvert built by the city of Newton was not raised. No cross-bill was filed to settle the rights between the defendants therein, and their rights are not concluded by the decree in that suit. *Beveridge* v. *New York Elevated Railroad*, 112 N. Y. 1. *Koelsch* v. *Mixer*, 52 Ohio St. 207. *Harvey* v. *Osborn*, 55 Ind. 535. *State Bank* v. *Bartle*, 114 Mo. 276.

Powers v. *Chelsea Savings Bank*, 129 Mass. 44, and *Torrey* v. *Pond*, 102 Mass. 355, relied on by the city, were cases in the nature of bills of interpleader, where the rights between the several defendants were put in issue.

The tire company also has set up the defence that the Commonwealth has not complied with the decree of March 5, 1903, because it "has not opened up the East Branch and put it in its original condition, but, on the contrary, has simply reproduced the artificial conditions of the raceway as it existed appurtenant to a mill." But on this point the finding of the Superior Court is against the tire company. It found, as we have already said, that the park commissioners "have excavated a channel on said East Branch and have removed all obstructions on said East Branch within the limits of the Commonwealth's ownership

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which would interfere with the free and natural flow of the water, with the exception of a bank of earth at the upper end of said channel and a sheathing of boards on the line of said Boylston Street, which was constructed to prevent the said street from falling in."

It also contends that by the report of the Superior Court it appears that it is maintaining a dam on the west branch, and that "at times of spring high water, with the gates open, the water flows over the top of the dam to a depth of eighteen inches or more," that this dam is an obstruction within the limits of the ownership of the Commonwealth because it prevents the natural flow of water in the east branch by augmenting and accelerating the same, and that this dam on the west branch has not been removed as required by said decree. This and the further question whether the city is bound to provide a larger culvert under Boylston Street by reason of the maintenance of this dam is not before us under the terms of this report.

The question of the right of the tire company to maintain its dam to keep out surface water from the streets until the natural flow of the east branch is restored need not be considered, as the decree in this suit will insure its being restored.

Upon the International Automobile and Vehicle Tire Company's being substituted as a defendant in place of the Newton Rubber Works, a decree may be entered directing that the answer of the Newton Rubber Works stand as the answer of the tire company; and thereupon a final decree may be entered directing the city of Newton to construct a culvert under Boylston Street sufficient to take care of the free and natural flow of the east branch of Charles River, and directing the tire company, upon the city's so doing, to remove its bulkhead north of Boylston Street.

So ordered.

R. G. Dodge, Assistant Attorney General, for the Commonwealth.

W. S. Slocum, for the city of Newton.

C. C. Read & G. L. Clarke, for the Newton Rubber Works.

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MOSES WILLIAMS, trustee, *vs.* CAROLINE B. THACHER & others.

SAME *vs.* REBECCA C. B. LIFFLER & others.

Suffolk. May 20, 1904. — June 24, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Trust, Termination. *Devise and Legacy*, Construction.

It is within the power of the court to terminate a trust as to certain property and continue it as to other property where reasons exist for doing so.

A testator provided that a trust for his children should terminate when his youngest surviving child arrived at the age of twenty-one years, and another clause of his will provided that a portion of the trust fund consisting of one undivided half of the mansion house and appurtenant buildings and lands formerly belonging to the testator's father should be used and occupied by the testator's sister during her life or until sold under a power of sale given to the trustees to hold the proceeds subject to the trust, and that all taxes and assessments on the mansion house property should be paid by the trustees during the life of his sister. When the testator's youngest child came of age the testator's sister was still living and objected to the termination of the trust. *Held*, that the trust should be terminated as to all the property except that in which the testator's sister had a life interest and so much more as was necessary to provide for the payment of taxes and assessments upon the premises.

A testator left the residue of his property to trustees to expend such portion of the net income as in their judgment should be deemed necessary for the proper support, maintenance and education of his children in such proportion as to each child and in such manner as they might deem wise and prudent until his children should arrive at the age of twenty-one years, and to add the residue of the income to the principal, and when and as often as his children should arrive at the age of twenty-one years to pay over to them respectively on arriving at that age an equal share of the income derived from the trust property, proportionate to the number of his children then living and the issue of any deceased child representing their deceased parent, until the youngest of the testator's children surviving should arrive at the age of twenty-one years, and then to convey and transfer the property to the testator's children then living and the issue of any deceased child by right of representation. *Held*, that the children of the testator were not to receive equal shares of the income from the beginning to the final distribution including what was necessary for their education and maintenance, but that they were to receive according to their respective necessities until arriving at the age of twenty-one years, and after that their shares of the income as prescribed by the will until the time for the distribution of the fund, when each should receive an equal share.

TWO BILLS IN EQUITY, both filed February 10, 1904, one by Moses Williams as trustee under the will of William G. Thacher,

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late of Boston, and the other by the same person as trustee under the will of Rebecca C. Billings, late of Boston, both for instructions.

The two cases came on to be heard before *Lathrop*, J., who reserved each of them upon the bill, answers and agreed facts for determination by the full court, such decrees to be entered therein as justice and equity might require.

The will of William G. Thacher was dated September 14, 1883, and proved October 15, 1883. Omitting the introductory and attesting clauses and the signatures, it was as follows:

"First. I hereby constitute and appoint my sister Caroline B. Thacher and my sister in law Maritta B. Thacher and the survivor of them to be the executors and executor of and trustees and trustee under this my last will directing them to pay all my just debts and funeral expenses out of my estate, and I hereby direct and request that they or either of them shall not be required to give any bond or bonds or any surety or sureties on any bond or bonds as such executors or as such trustees but that they be exempt and excused therefrom.

"Second — All the rest, residue and remainder of my estate and property real, personal and mixed of which I shall die seized or possessed or to which I shall be entitled at the time of my decease, I give devise and bequeath to the said Caroline B. Thacher and Maritta B. Thacher and the survivor of them and her heirs and assigns in trust and to hold the same to the uses and upon the especial trusts hereinafter mentioned and expressed of in and concerning the same that is to say

"Third — To permit my said sister Caroline B. Thacher during and for the term of her natural life free from any charge for rent or occupation to use, occupy and improve the mansion house of my late father Thomas Thacher and the out buildings land and garden thereto appertaining meaning thereby the dwelling house barn stables and out buildings and all the land on the Northerly side of Alleghany Street between lands now or late of Bouvé on the east and lands of Rebecca C. Billings on the west in that part of Boston lately known as Roxbury now owned by my said sister and myself in equal shares and I direct my said trustees to pay all taxes and assessments which may be assessed on said premises, meaning hereby the taxes and assessments on

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my undivided half of said premises during the said term of my sisters natural life or until said premises shall be sold and conveyed under the power hereinafter given my trustees.

"Fourth — Also to permit my said sister Caroline B. Thacher to have the use and enjoyment during said term of her natural life, of all the personal property belonging to me or in which I have. any interest and contained in said mansion house at the time of my decease, comprising household furniture, paintings, engravings statuary maps books silver ware and plated ware kitchen utensils crockery hardware ornaments jewelry etc. excepting books of accounts and evidences of property also the use and enjoyment of the horses, carriages, wagons, harnesses stable furniture garden farming tools and utensils hay and grain which shall be in said stables barns and out buildings at the time of my decease also the use and enjoyment of all the property in my billiard room and bowling alley.

"Fifth — That the said trustees or the survivor of them or their successors in said trust shall take and receive the rents profits interest and income accrueing from all the rest residue remainder and reversion of my estate and property real personal and mixed of which I shall die seized or possessed or to which I shall be entitled at the time of my decease and therewith make all necessary repairs pay all taxes and assessments and other necessary charges and expenses in and about the same and after all such payments deducted to expend such portion of the said net rents, profits interest and income as in their judgment shall be deemed necessary for the proper support maintenance and education of my children in such proportion as to each child and in such manner as they may deem wise and prudent until my said children shall arrive at the age of twenty one years and the residue of such rents profits interest and income to add to the principal and to invest and keep invested in such manner as they shall deem best and when and as often as my said children shall arrive at the age of twenty-one years to pay over to them as they shall respectively arrive at the age of twenty-one years an equal share proportionate to the number of my children then living and issue of any deceased child such issue to represent their deceased parent of the income derived from my said property and of the income of the increase thereof, until the youngest of my

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said children who shall live, shall arrive at the age of twenty-one years, or in case my said trustees or whoever shall succeed them in said trust shall think it more for the benefit or interest of said children or either of them after they shall have arrived at the age of twenty-one years it is my will that they should appropriate to the maintenance and support of my said children or either of them after their arrival at the age of twenty-one years her or their proportion as aforesaid of said net rents, interest and income of said trust property instead of paying it over to my said children or child and I expressly declare that any sale, transfer, assignment or alienation made by said children or either or any of them of said net rents interest or income or any parts or part thereof before it shall have been actually paid to or appropriated for her or them shall be utterly void and not binding on my said trustees.

"Sixth — If either of my children shall die before the distribution of the principal of the trust fund as hereinafter provided leaving issue surviving her then I direct that such proportionate part of the income of said trust fund which would in her life time be payable to or expended for the benefit of such deceased child of mine be paid by my trustees to such deceased child's surviving issue, such issue to take by right of representation.

"Seventh — If either of my children shall die before the distribution as hereinafter provided of the principal of said trust fund leaving no issue surviving her or if leaving issue they all die before the said distribution then I direct that such income as would otherwise be payable to or expended for the benefit of such deceased child of mine or her issue if living be appropriated by my said trustees in manner as aforesaid respecting the income of my estate to the benefit of my surviving children and the issue of such as have deceased such issue of a deceased child to take its parent's share by right of representation, but for those of my children who are living and under the age of twenty-one years the income is to be appropriated by my trustees in such manner and proportion as they my trustees think wise and prudent.

"Eighth — And when the youngest of my children who shall live shall arrive at the age of twenty-one years then I direct and request that my said trustees or whoever shall succeed them in said trust shall convey assign transfer set over and convey and

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pay to my children then living and to the issue then living of such as have deceased such issue of a deceased child of mine to take its deceased parents share by right of representation all the estate and property then remaining in their hands or possession and all increase thereof if any to have and to hold the same to them and their heirs and assigns to their use and behoof forever in fee simple.

"Ninth — If none of my children live to arrive at the age of twenty one years or if after arriving at the age of twenty one years and before the distribution of the principal of said trust property they all die leaving no issue or if leaving issue surviving them such issue all die before the distribution of the trust property as aforesaid, then and in such case, I give devise and bequeath all the said trust property then remaining in the hands and possession of said trustees or their successors in said trust to such persons as shall at that time be my heirs at law.

"Tenth — I hereby authorize and empower my said trustees Caroline B. Thacher and Maritta B. Thacher and the survivor of them and such other trustees as shall be legally authorized to act as such from time to time to demise lease and let upon such terms and conditions as they shall think reasonable the whole or any part of my real estate given in trust as aforesaid and to sell and convey at any time or times the whole or any part of said real estate and the whole or any part of the personal estate and trust property which shall at any time be in their hands as trustees as aforesaid for such sum or sums price or prices as they shall think proper with full power and authority without applying to any court for that purpose to sign, seal execute acknowledge and deliver any lease or leases for any term of years or any deed or deeds which shall be effectual in law to pass a complete absolute and perfect title in fee simple to all or any part of said real estate devised in trust as aforesaid to the purchaser or purchasers thereof or to make any deed or deeds on condition or conditions to be afterward avoided or performed which my said trustees may deem necessary or proper to be executed with full power to make purchases investments and exchanges to take and receive deeds to convert real into personal and personal into real estate and that again to exchange and re-exchange in such manner as to them shall seem expedient it being my intention to give

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to my said trustees and those who may be made such the same dominion and control of said trust property as I now have, provided however that all money received for sales all property purchased by the proceeds of any sold or exchanged and all property received in lieu of that sold by the authority aforesaid shall be held for the like trust and purposes and to the like uses and none other as that parted with sold or exchanged and as hereinbefore fully declared and none other.

"I direct and request that my said sister Caroline B. Thacher shall be appointed guardian of my minor children and that she have the custody and care of their persons and property and I direct and request that she be not required to give any bond or bonds or any surety or sureties on any bond or bonds as such guardian but that she be exempt and excused therefrom. And in case my said sister Caroline B. Thacher should decease during the minority of my said children or either of them then I direct and request that my said sister in law Maritta B. Thacher shall be appointed guardian of my minor children and that she have the custody and care of their persons and property and I direct and request that she be not required to give any bond or bonds or any surety or sureties on any bond or bonds as such guardian but that she be exempt and excused therefrom."

There also was a codicil dated September 15, 1883, ratifying the provisions of the will and further directing that the executors and trustees should be excused from giving sureties on their bonds.

In the second case it was agreed that the provisions in the will of Rebecca C. Billings in regard to which the plaintiff prayed for instructions were substantially in the same language as the corresponding provisions in the will of William G. Thacher.

H. Williams, Jr., for Caroline B. Thacher.

A. H. Latham, for Mary DeW., Margaret W. and Lillian C. Thacher.

A. L. Lincoln, for Rebecca C. B. Liffler and Elizabeth B. Thacher.

KNOWLTON, C. J. In the first of these cases the fundamental question is whether the trust shall be terminated, wholly or in part. The eighth clause of the will which created the trust is as follows: "And when the youngest of my children who shall live

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shall arrive at the age of twenty-one years then I direct and request that my said trustees or whoever shall succeed them in said trust shall convey assign transfer set over and convey and pay to my children then living and to the issue then living of such as have deceased such issue of a deceased child of mine to take its deceased parents share by right of representation all the estate and property then remaining in their hands or possession and all increase thereof if any to have and to hold the same to them and their heirs and assigns to their use and behoof forever in fee simple." If this were the only material provision, there would be no doubt that the trust should be immediately terminated; for the youngest of the children has arrived at the age of twenty-one years, and all parties interested in this part of the trust desire its termination. *Bowditch* v. *Andrew*, 8 Allen, 339, 341. *Sears* v. *Choate*, 146 Mass. 395, and cases cited. But there is a part of the property that is subject to a provision in the third clause, which requires the trustees to permit the testator's sister, Caroline, during the term of her natural life, to use, occupy and improve the mansion house and the outbuildings and appurtenant lands which formerly belonged to the testator's father, of which one undivided half belonged to the testator at the time of his death, and the other half belonged to this sister. The trustees are also required by this clause, to pay all taxes and assessments on the premises during the term of his sister's natural life, or until such premises shall be sold and conveyed under the power given to the trustees. The tenth clause gives the trustees a general power to sell and convey the whole or any part of the real estate, and to hold the proceeds subject to the trust.

It is contended by the children of the testator that the first quoted provision for the termination of the trust, together with the power of sale given to the trustees, should control the provision for a life estate in the mansion house to his sister, and that the trust should therefore be terminated at once. It is contended by the sister that the trust must continue as to the whole property, not only for the preservation of her life estate and the payment of assessments and taxes, but also for the final disposition of the mansion house, and the division of the entire property of the trust, which is treated as one fund, to be kept together until the trust is finally terminated.

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The intention of the testator in regard to the conditions now existing does not clearly appear. In some particulars the third clause of the will is inconsistent with the eighth clause. Probably he did not suppose that his sister would live long enough to make her life estate interfere with the termination of the trust when his youngest child should arrive at the age of twenty-one years. This child was less than a year old when her father died. There is little doubt that he intended to have his estate divided among his children when the youngest of them should become twenty-one years of age, and there is little doubt that he intended that his sister should have a life estate in the mansion house, or in the proceeds of it if it should be sold. We are of opinion that the trust for the benefit of his sister cannot be set aside or terminated in her lifetime, and that the trust must be continued so far as necessary to protect her rights.

On the other hand, it is in the power of the court, for good reasons, in certain cases, to terminate a trust as to certain property and to continue it as to other property. *Inches* v. *Hill*, 106 Mass. 575. *Sears* v. *Hardy*, 120 Mass. 524. There is much in this case to indicate that the termination of the trust when his youngest child should reach the age of twenty-one years, was an important, if not a paramount, purpose in the thought of the testator in reference to the final disposition of his property. So far as this purpose can be accomplished without defeating his purposes in other particulars, it should be accomplished. We are of opinion that the trust should be terminated as to all the property except that in which his sister has a life estate, and so much more as is necessary to be held for the payment of taxes and assessments upon the premises. This is in accordance with the rule applied in *Sears* v. *Hardy*, 120 Mass. 524, and is in conformity with the general purpose of the testator.

In *Schaffer* v. *Wadsworth*, 106 Mass. 19, a case somewhat like this, a different result was reached. But we are of opinion that the importance of the early disposition of the bulk of the property, as compared with that of the continuance of the trust without change, as indicated by the provisions of the will, was not the same as in the present case.

The other question is common to both of the cases. It is whether the testator's children are to receive in each case the

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trust fund now in the hands of the trustee, in equal shares, so far as it is ready for distribution, or whether there is to be an equalization of the entire amounts received and to be received, including the sums paid as necessary for the support, maintenance and education of the children during their minority.

We are of opinion that the provisions of each will show the intention of the testator that the several children should not receive equal shares from the beginning to the final distribution, including that which was necessary for education and maintenance, but that they should receive according to their necessities until arriving at the age of twenty-one years, and after that time should be paid income, as prescribed by the will, until the time for the division of the fund, and that then the division of the amount in the hands of the trustee should be in equal shares to each. To give the will a different construction would require us to disregard language which seems reasonably plain.

Decrees accordingly.

VALENTINE T. SELLERS' CASE.

Essex. June 21, 1904. — June 24, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Habeas Corpus. Practice, Criminal.

Where proceedings on a petition for a writ of *habeas corpus* are adjourned into the full court by the order of a single justice, and the facts although uncontroverted are not agreed in writing, they must be brought before the full court by a report of the single justice.

Under R. L. c. 191, § 1, cl. 2, one who has been sentenced to imprisonment for a misdemeanor upon a default when asking for a trial, is not entitled to prosecute a writ of *habeas corpus*, his remedy being by writ of error if his restraint is illegal.

BARKER, J. This was a petition for a writ of *habeas corpus* addressed to the "Justices of the Supreme Judicial Court," and was first presented to a justice of the court at chambers on June 11, 1904, who thereupon ordered a notice to show cause returnable in the Suffolk equity session on June 14. On that day the respondent * filed an answer and the cause was set for hearing in

* Master of the house of correction and keeper of the jail at Salem.

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the equity session for June 17. On that day the petitioner, the respondent and the district attorney for the eastern district were present and the cause was heard in the equity session. Upon the hearing it appeared that the statements of fact in the petition and answer were uncontroverted and true, and that the parties desired the determination of the full court upon the questions of law arising thereon, and the cause was adjourned into the full court.

On June 21 at a sitting of the full court in Boston the petitioner, the respondent and the district attorney for the eastern district were present and stated in court that there was no controversy as to the facts, and the cause was argued upon the law by the petitioner and the district attorney.

The court was of opinion that as the record disclosed no written agreement as to the facts and as the facts were not reported to the full court by the justice who ordered the adjournment, the questions of law intended to be raised could not be considered by the full court without further proceedings. See *King's case*, 161 Mass. 46, 50.

Thereupon with the assent of the parties the facts were reported to the full court as of June 17 by the justice who adjourned the case into the full court, the record was amended accordingly and the questions of law arising upon the petition and the reported facts were considered by the full court.

The facts reported were these. An indictment for the offence of publishing a libel was returned by the grand jury to the Superior Court sitting at Newburyport in and for the county of Essex in May last against Valentine T. Sellers, upon which indictment he was arraigned and to which he pleaded that he was not guilty, and thereupon he was admitted to bail. On May 27 he failed to appear in court to answer to the indictment in accordance with his recognizance and he was thereupon defaulted. On the sixth day of the present June he voluntarily appeared in the court and moved to have his default removed and prayed to be again admitted to bail and allowed a trial. It was thereupon ordered by the court that the default should remain, that he had forfeited his bail and his right of trial by jury, and he was thereupon sentenced by the court for the offence of which he stood indicted to confinement to hard labor for the term of

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nine months in one of the houses of correction in the county of Essex and to stand committed according to the sentence, and a mittimus was issued from the Superior Court on the sixth day of June upon which he is now confined in the house of correction at Salem in execution of the sentence.

Upon consideration of these facts we assume without so deciding that there was no power in the Superior Court to impose the sentence in execution of which Sellers is now confined. But we are of opinion that as the Superior Court had jurisdiction of the case in which the sentence was imposed, the prisoner ought to be left to his remedy by writ of error. See R. L. c. 191, § 1, cl. 2; *Fleming* v. *Clark*, 12 Allen, 191, 194, and cases cited; *Sennott's case*, 146 Mass. 489; *Stalker, petitioner*, 167 Mass. 11; *Bishop, petitioner*, 172 Mass. 35. For this reason the order will be

Petition dismissed.

J. Donovan, for the petitioner.

W. S. Peters, District Attorney, for the respondent.

ARTHUR F. NEALE *vs.* AMERICAN ELECTRIC VEHICLE COMPANY.

Suffolk. January 15, 1904. — June 27, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Evidence, Extrinsic affecting writings.

In an action for alleged breach of a contract in writing to employ the plaintiff as exclusive agent in a certain territory to sell "certain kinds of electric vehicles" manufactured by the defendant, it appeared that the plaintiff was to have a certain commission on vehicles and parts of vehicles sold by the defendant on orders procured by the plaintiff and that the defendant never sold anything on orders procured by the plaintiff. The plaintiff offered to prove that the "certain kinds of electric vehicles" mentioned in the contract were understood and agreed by the parties to be machines described in certain catalogues and circulars as of a certain speed and capacity. The judge excluded the evidence and ordered a verdict for the defendant. *Held*, that the exclusion was right, there being no ambiguity in the contract which did not contain the warranty sought to be imported into it by oral evidence.

CONTRACT for alleged breach of a contract in writing to employ the plaintiff as exclusive agent in a certain territory to sell

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"certain kinds of electric vehicles" manufactured by the defendant. Writ dated January 1, 1902.

At the trial in the Superior Court before *Aiken*, J., without a jury, the plaintiff testified in his own behalf that he had had some years' experience as a salesman of electric vehicles, and that, before the date of the contract in writing, he had been employed by the defendant as a salesman, introducing and selling its vehicles. The plaintiff sought to introduce oral testimony as to the meaning in the contract of the words "certain kinds of electric vehicles," but upon objection of the defendant such oral testimony was excluded. Thereupon the plaintiff made the following offer of proof: "That the certain kinds of vehicles mentioned in the contract between the parties was understood and agreed between them to mean and include motor vehicles used for business and pleasure, propelled by means of electricity and electrical batteries, motors and mechanism, with the speed, capacity and desirability, and at the prices described and set forth in catalogues and printed circulars and price lists furnished by the defendant to the plaintiff to be used by him in pushing the sale of their goods."

The judge excluded the evidence stated in the foregoing offer of proof, and also excluded other evidence offered by the plaintiff to show that on account of defects and imperfections a certain company refused to buy an electric delivery wagon sent by the defendant upon an order procured by the plaintiff.

The judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The contract declared on was as follows:

"Memorandum of agreement made this thirty first day of December A. D. 1900, between the American Electric Vehicle Company, a corporation organized under the laws of the State of New Jersey, hereinafter called 'the Company,' party of the first part, and A. F. Neale, of Boston, in the State of Massachusetts, party of the second part.

"Whereas, The Company is the manufacturer of certain kinds of electric vehicles, and

"Whereas, The party of the second part is desirous of securing the exclusive agency for the sale, in the following territory namely all of Massachusetts east of a straight line drawn at

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right angles to southern boundary of Massachusetts and passing through Springfield, Mass. of electric vehicles so manufactured by the Company.

"Now, therefore, in consideration of the premises and of the sum of One Dollar to each of the parties in hand paid by the other, and of other good and valuable considerations, and of the mutual covenants and agreements herein contained, it is hereby mutually agreed by and between the parties hereto as follows:

"First: That, until this agreement shall be terminated, the party of the second part shall have the sole and exclusive right to sell, in the territory aforesaid, namely, all of Massachusetts east of a straight line drawn at right angles to southern boundary of Massachusetts and passing through Springfield, Mass., all electric vehicles or parts or equipments thereof or accessories thereto, manufactured by the Company.

"Second: That the party of the second part shall faithfully and vigorously apply himself, during the continuance of this agreement, to the business of selling, within the territory aforesaid vehicles, parts, equipments or accessories thereof manufactured by the Company, and that the party of the second part will not, during such period, engage, directly or indirectly, in the sale, within said territory or elsewhere, of any vehicles, parts or equipments of any kind other than those manufactured by the Company.

"Third: That the party of the second part shall bear all expenses in any way connected with the agency or business to be undertaken by him, hereunder, whether such expenses shall arise in connection with the selling or handling of the Company's vehicles in the territory or otherwise, except in such cases as where the Company may place any of the vehicles on trial in said territory for the purpose of demonstration, which will not be under control of the party of the second part, in which case, it is understood and agreed that the party of the second part shall not be held liable for any expense arising therefrom.

"Fourth: That the party of the second part shall not sell or take orders for the Company's vehicles at lower prices than list prices at the time such orders are taken and accepted, as here-

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inafter provided, except upon the specific authorization of the Company, which list or other prices the Company will furnish to the party of the second part upon reasonable request therefor, and any change in said list prices shall be immediately communicated to party of the second part.

"Fifth: All orders taken or sales made for or of the Company's vehicles, by the party of the second part, shall be taken and made subject to the acceptance and approval thereof by the Company, and notwithstanding anything hereinbefore contained, the party of the second part shall have no power to bind the Company to any orders taken or sales made until the same have been accepted and approved by the Company.

"The Company, however agrees to accept all orders of vehicles or parts thereof, or accessories thereto, so far as it, the Company, shall be liable to execute the same, provided the parties placing such orders are satisfactory to the Company in every way; viz, financially responsible of good repute and *bona fide* purchasers.

"Sixth: That the party of the second part shall receive, as full compensation for any and all services to be performed by him hereunder a commission of twenty per cent (20%) of the purchase price of each of the Company's vehicles sold by the Company on orders secured by the party hereto of the second part hereunder and accepted by the Company from purchasers resident in the territory assigned unto the said party of the second part, in paragraph, 1, of this contract, and such compensation to be computed, as aforesaid, on the purchase price of such vehicle or part or equipment thereof so sold.

"Seventh: That this discount, commission or reduction of 20% shall be paid by the said Company to said party of the second part immediately upon receipt of the purchase price by said Company for any vehicle part or equipment thereof, that is to say, twenty per cent (20%) of all or any payments, whether in whole or in part of the full purchase price, shall be immediately paid to said party of the second part, or the said party of the second part, may, at his option, remit to said Company eighty per cent (80%) of the purchase price of any said Company's products as payment in full for same.

"Eighth: It is also agreed that said Company shall supply to

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said party of the second part a reasonable amount of catalogues, to be used in pushing Company's business in above territory, which catalogues shall be furnished by said Company free of expense to said party of the second part.

"Ninth: This agreement shall continue for the period of one year from this date, provided that the party of the second part shall, during said year, have sold vehicles to the value of fifteen thousand ($15,000) dollars, manufactured by the party of the first part, and shall have performed all the terms and conditions hereunder mentioned, then the said party of the second part, shall have the option of continuing this agreement for another year on the same terms, and provided further, that during said second year said party of the second part shall have sold at least thirty thousand ($30,000) dollars worth of said goods, and in like manner, shall have kept and performed all aforesaid terms and conditions, then the party of the second part, shall have the option of continuing this agreement for a third year.

"In witness whereof the party of the first part has caused its corporate seal to be hereunto affixed and these presents to be signed by its Vice-President and the party of the second part has set his hand and seal, the day and year above written.

"American Electric Vehicle Co.
"By Geo. T. Risley
"Vice-President.

"Signed, sealed and delivered
in presence of;
"Louise B. Faisant
"A. F. Neale"

A. A. Hayden, for the plaintiff.

G. R. Nutter, for the defendant.

LATHROP, J. It seems to us very plain that the statement in the first "Whereas" of the contract that the defendant was the manufacturer "of certain kinds of electric vehicles" must be taken in connection with the second and third clauses of the contract, by the terms of which the defendant was to have the exclusive right to sell, within a certain territory, "all electric vehicles or parts or equipments thereof or accessories thereto, manufactured by the" defendant, and was to confine himself to the business of selling, within the territory named, "vehicles,

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parts, equipments or accessories thereof manufactured by the" defendant.

So construed, the ruling of the judge of the Superior Court excluding the offer of proof was right. There is no ambiguity as to the subject matter of the contract. By the sixth article of the contract the plaintiff was to receive "as full compensation for any and all services to be performed by him" a commission of twenty per cent of the purchase price of each of the defendant's vehicles or parts or equipment thereof sold by the defendant on orders secured by the plaintiff. It does not appear that the defendant sold anything upon orders procured by the plaintiff.

The purpose of the offer of proof was to introduce into the contract a warranty that its machines should possess certain qualities of speed, capacity and desirability. There is no warranty to be found in the contract, and a warranty cannot be imported into a contract by parol evidence. *Lamb* v. *Crafts*, 12 Met. 353. *Frost* v. *Blanchard*, 97 Mass. 155, 157. *Kinnard Co.* v. *Cutter Tower Co.* 159 Mass. 391.

Exceptions overruled.

MARTHA A. ROBERTSON *vs.* MINNIE H. ROBERTSON.

Suffolk. January 22, 1904. — June 27, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Equity Jurisdiction. Pledge.

An attempted pledge invalid for want of delivery cannot be enforced in equity.

In a suit in equity to enforce an alleged equitable pledge, it appeared, that the defendant's testator owed a certain sum of money to the plaintiff for which he gave the plaintiff a note and set aside as security for the note certain certificates of stock which he retained in his own possession and afterwards sold, that at his death an envelope was found in a trunk belonging to him containing two certificates of membership in cotton exchanges with a statement signed by him to the effect that these certificates were security in part for cash borrowed by him from the plaintiff, and had been so held since he had sold the shares of stock which previously had been the plaintiff's security. His estate was insolvent. *Held*, that, as it did not appear that the certificates of stock originally regarded as security ever were delivered to the plaintiff, there was no pledge on which to base an equitable claim to the certificates found in the trunk as having been substituted for a former security.

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BILL IN EQUITY, filed January 26, 1903, to enforce an alleged equitable pledge of two certificates of membership in cotton exchanges, the proceeds from the sale of which were in the hands of the defendant as executrix under the will of Edwin R. Robertson, late of Boston.

The Superior Court made a decree dismissing the bill with costs; and the plaintiff appealed.

H. D. Hardy, for the plaintiff.

T. W. Proctor, for the defendant.

LATHROP, J. This is a bill in equity, filed in the Superior Court against the defendant personally and as executrix of the will of Edwin R. Robertson, praying that the plaintiff be adjudged owner of certain money, being the proceeds of two certificates of membership, one in the New York Cotton Exchange, and the other in the New Orleans Cotton Exchange; and that the defendant pay over to the plaintiff the money thus obtained. In the Superior Court the bill was dismissed without costs; and the plaintiff appealed to this court.

The facts as they appear in the record are as follows: On May 13, 1899, the plaintiff lent to the defendant's testator the sum of $7,000, and received from him his promissory note, payable in three months, with interest at six per cent, which interest was paid to November 13, 1901. To secure this loan the defendant's testate gave as collateral security certain stock in the Robertson Paper Company, though it does not appear that a certificate of this stock was ever in the possession of the plaintiff. In the latter part of 1890, the defendant's testate sold this stock for $32,000. He died in 1902, and after his death an envelope containing the two certificates of membership were found in a trunk belonging to him, with a statement signed by him to the effect that these certificates were security in part for cash borrowed by him of the plaintiff, and had been so held since he sold out his Robertson Paper Company stock which had been her security before. These certificates were afterwards sold by the defendant with the assent of the plaintiff, and the proceeds deposited in a trust company. The estate of the defendant's testate is insolvent, and commissioners have been appointed.

The plaintiff's argument in this case proceeds upon the theory

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that she once held in her possession the shares of the Robertson Paper Company as collateral security for her loan, and delivered them to the defendant's testate that he might sell them and substitute other security. But this theory is not supported by the facts. The plaintiff did not testify as a witness, but called the defendant, who was asked on cross-examination this question: "Do you know as to the Robertson Paper Co. stock, did Mrs. Robertson have possession of that?" The answer was: "It was so held in the bank at Brattleboro as belonging to her, with other notes; I think she had Mr. Robertson's note, she must have had." She was then asked this question: "Why was it in the bank at Brattleboro?" and answered: "Because that is where his paper mill business was; you see the business was at Bellows Falls and they did their banking with the Brattleboro bank."

The Superior Court may well have found on this evidence that there was no delivery to the plaintiff of the certificate of the paper company's stock, and therefore no possession of the same by her. The case then is one of an attempted pledge, invalid for want of delivery. *Bonsey* v. *Amee*, 8 Pick. 236. *Moors* v. *Reading*, 167 Mass. 322.

Decree affirmed.

JAMES McGONIGLE & others *vs.* VICTOR H. J. BELLEISLE COMPANY.

Middlesex. January 28, 1904. — June 27, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Practice, Civil, Exceptions. *Conversion. Landlord and Tenant.*

The burden is upon a party excepting to the admission of evidence to show that he was prejudiced by its admission.

When the lessee under a lease in writing rightfully removes the goods of a tenant at sufferance he has the right to put them off the premises, but he has no right to remove the goods to a storehouse at his own expense to be held there for safe keeping subject to the order of the owner, if the owner is present and objects to this.

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LATHROP, J. This is an action of tort in three counts. The first count is for breaking and entering the plaintiffs' close, the second for the conversion of money and goods, and the third for the use of excessive force in removing the plaintiffs. The jury returned a verdict for the defendant on the first count, being so directed by the presiding judge, and for the plaintiffs on the last two counts; and the case is before us on the defendant's exceptions.

The facts in the case may be briefly stated as follows: The plaintiffs were tenants at will of one Marston. On February 24, 1903, Marston executed a lease to the defendant for the term of eighteen months from March 1, 1903. On March 10, the defendant gave the plaintiffs notice in writing that it had taken a lease of the premises and requested the plaintiffs to quit the premises, as it desired to occupy the same for its own use. An action by summary process was brought by the defendant to recover possession of the premises. On March 27, the agents and servants of the defendant, by its direction went to the premises occupied by the plaintiffs, and immediately after gaining possession removed the plaintiffs' goods to a storehouse. On the next day the defendant gave notice to the plaintiffs where the goods were, and offered to remove them to any place the plaintiffs might desire, without any expense to them. The evidence was conflicting as to whether there was any opposition to the removal of the goods after possession was obtained; and there was evidence tending to show that the plaintiffs resisted the attempt of the defendant to enter the premises and to obtain possession, and requested the return of a trunk alleged to contain money after it had been placed on a wagon for removal, but were driven away.

There are but two exceptions in the case. The first exception relates to the admission of evidence in behalf of the plaintiffs, against the defendant's objection, of a certified copy of the record of the proceeding by summary process in the police court of the city of Lowell. While the record was admitted, the decision of the trial judge thereon was not allowed to be read to the jury. The bill of exceptions does not contain the copy of the record, nor does it disclose for what purpose it was admitted. The plaintiffs state in their brief that it was offered under the

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first count and admitted before the judge ruled that they could not recover on the first count, and there is nothing in the bill of exceptions to show the contrary. If this is so, the defendant has no ground of exception. *Commonwealth* v. *Meserve*, 154 Mass. 64, 69. *Folsom* v. *Ballou Banking Co.* 160 Mass. 561, 562. *Barker* v. *Mackay*, 175 Mass. 485, 489. However this may be, and without passing upon the question whether the record was admissible under the first count, we regard it as immaterial, and do not see how the mere fact that the defendant had brought a summary proceeding against the plaintiffs could have prejudiced the defendant. The burden is on the defendant, as the excepting party, to show that it was prejudiced by the admission of the evidence, and we are of opinion that this burden has not been sustained. *Earle* v. *Earle*, 11 Allen, 1, 2. *Potter* v. *Baldwin*, 133 Mass. 427, 429, 430. *Worcester Coal Co.* v. *Utley*, 167 Mass. 558, 560. *Koplan* v. *Boston Gas Light Co.* 177 Mass. 15, 23.

The remaining exception relates to the refusal of the judge to give an instruction requested and to the instructions given. The request was as follows: "If the defendant had the right to remove the goods of the plaintiffs and to obtain possession of the premises wherein they were, the defendant was justified in taking reasonable precaution to prevent the loss or damage to the goods or effects of the plaintiffs by putting them in a suitable place for storage at the expense of the defendant, subject to the order of the plaintiffs, giving them reasonable notice that the same were stored for safe keeping, subject to the order of the plaintiffs."

The instructions given were as follows: "If you are satisfied from the evidence that the servants or agents of the defendant took goods, and held those goods a moment longer than was reasonable and necessary to remove them from the premises against the will of the plaintiffs, then the plaintiffs can recover the value of the goods. If you think in all the defendant did in taking the goods of the plaintiffs to the storehouse, it was not acting in opposition to the will of the plaintiffs, did not take control of the goods against the will of the owners but was acting together peaceably with the plaintiffs and set up no claim against the will of the owners, the defendant is not liable. But

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if you think that the defendant undertook to remove the goods beyond the premises to the storehouse, if you are satisfied from that time, or at that time, that the plaintiffs expressed a wish against that, or sought to retain to themselves the possession of the goods, then the act of the defendant is an act of ownership in opposition to the wishes of the plaintiffs and the defendant is responsible for the value of such goods. If you think that there was such a control and you think that any property was lost afterwards, although it was taken by somebody not a servant of the defendant, the defendant is responsible. All the defendant had a legal right to do with the goods was to take them and remove them from the premises; it could set them down in the street, set them down anywhere. From the moment they were off the premises, the right which the law gave the defendant to take possession of the goods was at an end. If, after that time, it exercised any control over the goods in opposition to the will of the plaintiffs, they were responsible, and they were responsible from that moment for the value of all the goods which they so took."

We are of opinion that on the evidence in the case the instruction requested was stated too broadly and the rulings were right. The defendant had a right to put the goods off the premises. *Clark* v. *Keliher*, 107 Mass. 406. But it had no right to exercise control or dominion over them beyond this, without the assent of the plaintiffs express or implied. "Conversion may be shown by the exercise of control over the property, inconsistent with the right of the owner, and by excluding him from the possession or depriving him of it." Allen, J., in *Scollard* v. *Brooks*, 170 Mass. 445, 448.

In the case before us there was evidence that the plaintiffs were present, and, if so, they could have taken care of their own goods. There was also evidence of a refusal by the defendant's agents and servants to deliver up a trunk said to contain money. The case differs from *Lash* v. *Ames*, 171 Mass. 487, in several respects. In that case the house was full of old building materials, which had to be removed from the building and could not be placed in the street without becoming a public nuisance. It was necessary that they be moved away, and the owner of the land offered to take them wherever the tenant wished. The

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tenant would give no directions. In the case before us, the taking away and storing were without consulting the plaintiffs.

The order must be

Exceptions overruled.

J. J. Pickman, for the defendant.

S. J. Elder, E. A. Whitman & J. T. Pugh, for the plaintiffs.

JOHN H. WEBBER, JR., administrator, *vs.* CAMBRIDGEPORT SAVINGS BANK.

Middlesex. January 28, 1904. — June 27, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, & BRALEY, JJ.

Practice, Civil, Agreed statement of facts. *Savings Bank*, By-law. *Contract*, Validity, Construction.

Where an agreed statement of facts provides that the "court may draw such inferences of fact as are warranted" and the Superior Court makes a finding thereon, an appeal presents only questions of law, and this court cannot draw inferences of fact.

A by-law of a savings bank provided as follows: "No person shall receive any part of his principal or interest, without producing the original book, that such payments may be entered therein, unless it is proved to the satisfaction of the trustees or the treasurer that such book shall have been lost or destroyed, in which case a legal discharge shall be given." *Held*, that, even if intended to do so, this by-law could not oust the courts of their jurisdiction by substituting the trustees or treasurer as the tribunal to determine whether a bank book was lost or destroyed, and in an action to recover a deposit alleged to have been made by the plaintiff's intestate in a savings bank having such a by-law, where the bank book is not produced, a finding for the plaintiff can be sustained if there is evidence sufficient to satisfy the mind of a reasonable man that the bank book has been lost or destroyed.

CONTRACT to recover money alleged to have been deposited by the plaintiff's intestate in the Cambridgeport Savings Bank, with interest thereon. Writ dated February 6, 1903.

In the Superior Court the case was presented upon an agreed statement of facts, concluding with the words "Court may draw such inferences of fact as are warranted." The Superior Court found for the plaintiff in the sum of $1,744.98; and the defendant appealed.

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E. H. Jose, for the defendant.

H. H. Winslow, for the plaintiff.

LATHROP, J. The Superior Court having found for the plaintiff on an agreed statement of facts, which contained the words "court may draw such inferences of fact as are warranted," the defendant's appeal presents to us only questions of law, and we are not authorized to draw any inferences of fact. *Cochrane* v. *Boston*, 1 Allen, 480. *Charlton* v. *Donnell*, 100 Mass. 229. *Rand* v. *Hanson*, 154 Mass. 87, 91. *Ingalls* v. *Hobbs*, 156 Mass. 348.

The plaintiff contended that, on the evidence in the case, the deposit book was lost or destroyed. The finding of the Superior Court was in accordance with this view, and it is not seriously contended that this finding was not justified by the evidence. The seventeenth by-law of the defendant provides that "no person shall receive any part of his principal or interest, without producing the original book, that such payments may be entered therein, unless it be proved to the satisfaction of the trustees or the treasurer that such book shall have been lost or destroyed, in which case a legal discharge shall be given." The defendant sets up this by-law in defence, and contends that no evidence of such loss or destruction has been furnished it, either by the intestate or by the administrator, that satisfies the treasurer or trustees that the deposit book has been lost or destroyed.

Treating the by-law as a contract between the parties, the defendant could not thereby render its treasurer or trustees the final arbiter of the question whether a bank book was lost or destroyed, and thus oust the courts of their jurisdiction. *Miles* v. *Schmidt*, 168 Mass. 339. If it means less than this, it falls within that class of cases where something is to be done to the satisfaction of another, which is not a mere matter of taste. In such cases it has been held that the test is not the arbitrary decision of the person concerned, but the mind of a reasonable man. See *Hawkins* v. *Graham*, 149 Mass. 284, and cases cited; *Page* v. *Cook*, 164 Mass. 116; *Lovett* v. *Farnham*, 169 Mass. 1, 5.

We cannot say, as matter of law, that the agreed facts do not show enough to satisfy the mind of a reasonable man that the deposit book was lost or destroyed.

Judgment on the finding for the plaintiff.

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DAVID DUNN *vs.* OLD COLONY STREET RAILWAY COMPANY.

Plymouth. January 29, 1904. — June 27, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Negligence, Contributory, On highway.

The owner of furniture being transported in a wagon cannot recover from a street railway company for injury to the furniture by a collision with a car of the railway company if the driver of the wagon was not in the exercise of due care.

One who driving from an intersecting street approaches a street on which he knows that electric cars run in both directions and looking only in one direction is struck by a car coming from the other direction is not in the exercise of due care.

LATHROP, J. This is an action of tort by the owner of some furniture which was injured in consequence of the wagon on which the furniture was loaded coming into collision with an electric car of the defendant, at the corner of Main Street and Ford Street in Brockton. At the close of the evidence, the defendant asked the judge to rule that even if there was evidence of negligence on the part of the defendant, there was no evidence that the plaintiff was in the exercise of due care; and also that there was no evidence of negligence on the part of the defendant. The judge refused to give these requests for rulings. The jury returned a verdict for the plaintiff; and the case is before us on the defendant's exceptions.

We need not consider whether there was any evidence of the defendant's negligence sufficient to warrant the submission of the case to the jury; for we are of opinion that the evidence in behalf of the plaintiff showed negligence of the driver of the wagon; and that his negligence is to be imputed to the plaintiff is not contested.

Main Street in Brockton runs about north and south, and Ford Street runs into it at a right angle. On Main Street there are two lines of electric car tracks. The driver lived in Brockton and was familiar with Main Street and with the fact that cars ran both ways upon it. While on Ford Street, at a point fifty or sixty feet distant from Main Street, he looked towards the north and saw no car coming; but he did not look towards the south,

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from which direction the car came that struck his wagon. He testified that he did not look again for a car, but watched his horses, which were walking. There were two persons on the seat with him, and he testified that he did not know there was any car until one of these persons said: "Here is a car coming down Main Street, and, by gorry, he is going to hit you Billy"; that he put the whip to the horses, but it was no use; that the car struck the tail board and the hind wheel and tipped the wagon over; and that the accident occurred on a pleasant afternoon in September, when it was light and one could see everything.

The only other witness for the plaintiff testified that when the horses were on the track he happened to look up and saw the car coming, and said to the driver, "Give them the whip, Billy, the car is coming, and is going to strike you." It also appeared that there was nothing to prevent the driver's seeing the car, had he looked, at any time after he was fifty or sixty feet away from Main Street.

On the evidence in this case the driver failed to exercise that care for the safety of the wagon which ordinarily careful persons are accustomed to use under like circumstances. The case cannot be distinguished from *Hurley* v. *West End Street Railway*, 180 Mass. 370. See also *Kelly* v. *Wakefield & Stoneham Street Railway*, 175 Mass. 331. In the opinion of a majority of the court the entry must be

Exceptions sustained.

W. D. Turner, (*G. Hogg*, with him,) for the defendant.

F. M. Bixby, for the plaintiff, submitted a brief.

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THOMAS P. DAILY *vs.* FIBERLOID COMPANY.

Essex. March 8, 1904. — June 27, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Negligence, Employer's liability.

In an action by a night watchman and fireman against his employer for injuries from a fall caused by the canting over of a plank runway up which the plaintiff was wheeling ashes in an iron barrow, it appeared, that the plaintiff had been in the defendant's employment as night watchman and fireman for about twelve years, that for about a month before the accident the runway had been warped and twisted and the plaintiff had been accustomed to trig up with a wooden wedge one of the corners of the runway resting on the floor, that when the wedge was in the plank was firm but that it was rickety without it, that three or four days before the accident the plaintiff told the defendant's superintendent that the plank was warped or "rockety" and that it was not fit to wheel on, and the superintendent said that he would see to it. The plaintiff testified that he supposed the wedge was in when he started up the plank because he "generally looked every barrel." *Held*, that the plaintiff could not recover, as he fully knew the condition of the runway and assumed the risk, and there was nothing to show that his continuing to work was induced by any statement of the superintendent.

LATHROP, J. This is an action begun in the Superior Court for personal injuries sustained by the plaintiff while in the defendant's employ, on April 12, 1903. The declaration contained three counts; the first and second under the R. L. c. 106, § 71, cls. 1, 2, and the third at common law. At the close of the plaintiff's evidence a verdict was directed for the defendant, and the case is before us on the plaintiff's exceptions.

The plaintiff had been in the employ of the defendant for about twelve years, as a night watchman and fireman. He worked from six o'clock in the evening until half past six the next morning. He was required to make his rounds as watchman, and to attend to the fires under three boilers. The floor of the boiler room was about three feet below the surface of the ground. The plaintiff was required to remove the ashes from under the boilers to a place in the yard outside the boiler room. The ashes were wheeled in an iron barrow from the floor of the boiler room up an inclined runway and through a doorway to the yard. There was a short flight of steps from the floor of the

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boiler room to the doorway. The runway was about fifteen feet long, and about thirteen inches wide. It was made of two pieces of plank that were nailed together, and it was bevelled on the edge that rested on the floor of the boiler room. It was made in the carpenter's shop of the defendant, and had been in use about three months at the time of the accident. About a month before the accident this runway had become warped and twisted, so that only one corner of it rested on the floor, and the plaintiff was accustomed to trig up the other corner on the left side of the runway, so that it might have an even bearing on the floor, using for this purpose a piece of joist which was bevelled in the shape of a wedge. When the runway was not in use it stood in a corner of the boiler room, and the wedge was usually placed on a pile of coal. The plaintiff had wheeled out ashes from the place where he was at work for two or three years before the accident. The accident happened about five o'clock on Sunday morning, and during the night before the plaintiff had wheeled out over the runway eight or nine loads of ashes. When he was wheeling another load, and when about half way up the incline, the runway canted to the left, and he was thrown to the floor and injured.

The plaintiff testified that, with the trig in, the plank was firm, and with it out the plank was rickety; that he knew it was necessary to have the trig in. And yet, when asked whether the trig was in when he started up the plank, his answer was, "I suppose it was, because I generally looked every barrel." And he puts it no higher than that. We are of opinion that as the plaintiff was a man of experience, and knew fully the condition of the runway, he assumed any existing risk. *O'Maley* v. *South Boston Gas Light Co.* 158 Mass. 135. *Carrigan* v. *Washburn & Moen Manuf. Co.* 170 Mass. 79.

The plaintiff relies upon a conversation with the defendant's superintendent, to show that he did not assume the risk. The accident, as we have already stated, took place early on Sunday morning, and the plaintiff testified that, on the Wednesday or Thursday before, he told the superintendent that the plank was warped or "rockety"; that it was not fit to wheel on; and that the superintendent said he would see to it. There was no evidence in the case that the plaintiff continued at work in reliance

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upon any statement made by the superintendent, and unless this is shown the rule stated in *Counsell* v. *Hall*, 145 Mass. 468, does not apply. *Lewis* v. *New York & New England Railroad*, 153 Mass. 73. *Westcott* v. *New York & New England Railroad*, 153 Mass. 460. *Levesque* v. *Janson*, 165 Mass. 16. *Silvia* v. *Wampanoag Mills*, 177 Mass. 194. *McClusky* v. *Garfield & Proctor Coal Co.* 180 Mass. 115. See also *District of Columbia* v. *McElligott*, 117 U. S. 621; *Marsh* v. *Chickering*, 101 N. Y. 396; *Illinois Steel Co.* v. *Mann*, 170 Ill. 200.

On the whole case we are of opinion that the order must be

Exceptions overruled.

J. P. Sweeney, (*R. E. Burke* with him,) for the plaintiff.

W. I. Badger & W. H. Hitchcock, for the defendant.

SAMUEL C. LAWRENCE, trustee, *vs.* DAVID K. PHILLIPS & others.

Suffolk. March 11, 1904. — June 27, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Devise and Legacy, Construction. *Words*, "Surviving children."

A will gave the residue of the estate of the testatrix to trustees to pay the net income in equal shares to her seven children named for life, and proceeded as follows: "In the event of the death of either of my said children, and as they may severally decease, I give, devise, and bequeath, his or her equal share in said trust fund, and any accumulated interest thereon, to his or her lawful issue, upon their arriving to the full age of twenty-one years, and in the event of the death of any of my said children, without lawful issue living, or if living, and not arriving to the full age of twenty-one years, I give, devise, and bequeath, his or her interest in said trust fund to the surviving children and their heirs and assigns forever, share and share alike, my daughters' share to continue in trust, as is herein provided for the original share." All of the children survived the testatrix. One of them died leaving a son, and later another died without issue. *Held*, that the son of the child first deceased did not share in the remainder which took effect on the death of the other child without issue, as the words "surviving children" referred to those surviving at the death of one of the children, and did not include grandchildren. *Balch* v. *Pickering*, 154 Mass. 363, distinguished and doubted.

BILL IN EQUITY, filed July 20, 1903, by the trustee under the will of Maria L. Phillips, late of Swampscott, for instructions.

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The case came on to be heard on the bill and answers before *Loring*, J., who decided that, according to the true construction of the will of the testatrix, the share of the trust fund to the income of which her son, Warren W. Phillips, was entitled during his life, was divisible only among the five children of the testatrix that survived him, the shares of her daughters to be held by the trustees upon the trusts provided in the will concerning the original shares, and that the defendant Eben B. Phillips, the son of John C. Phillips, who died before Warren W. Phillips, was not entitled to participate in the division of this share. The justice directed that a decree should be entered accordingly, and with the consent of the parties reserved the case for determination by the full court.

W. H. Niles, for Eben B. Phillips.

J. L. Thorndike, for the four surviving children.

LATHROP, J. By the fourth clause of the will of Maria L. Phillips the residue of her estate is given to trustees in trust to pay the net income in equal shares to the seven children named for life. The clause then proceeds as follows: "In the event of the death of either of my said children, and as they may severally decease, I give, devise, and bequeath, his or her equal share in said trust fund, and any accumulated interest thereon, to his or her lawful issue, upon their arriving to the full age of twenty-one years, and in the event of the death of any of my said children, without lawful issue living, or if living, and not arriving to the full age of twenty-one years, I give, devise, and bequeath, his or her interest in said trust fund to the surviving children and their heirs and assigns forever, share and share alike, my daughters' share to continue in trust, as is herein provided for the original share."

All of the children survived the testatrix. In 1896, one of them, John C. Phillips, died, leaving one son, the defendant Eben B. Phillips. Another child, Warren W. Phillips, died without issue on March 2, 1903, and the question presented is whether the son of John C. Phillips is entitled to share with the five surviving children of the testatrix in the distribution of the share of Warren W. Phillips.

We are of opinion that the son of John C. Phillips is not entitled to share in his uncle's estate. The will on this point is

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clear and explicit that the share of a child dying without issue shall go to the surviving children. The words "surviving children" here must refer to those surviving at the death of one of the children. *Coveny* v. *McLaughlin*, 148 Mass. 576. *Bigelow* v. *Clap*, 166 Mass. 88. This is the natural construction of the words used.

It is true that the word "children" has sometimes been held to include grandchildren; and this is done "where it can fairly be seen from the context that such was the intention of the testator as exhibited in his will," as is said by Mr. Justice Devens in *Bowker* v. *Bowker*, 148 Mass. 198, 203. In that case, when the testator made his will, one of his children, a daughter, had died leaving issue, and there were various clauses in his will showing that he intended to treat these children as representing their mother's share.

There are also other cases in which a similar result has been reached from the context of the will. See *Minot* v. *Taylor*, 129 Mass. 160; *Niles* v. *Almy*, 161 Mass. 29; *Stone* v. *Bradlee*, 183 Mass. 165, 171. In the case before us there is nothing in the context which leads to this conclusion.

The principal case relied upon by the counsel for the grandson is *Balch* v. *Pickering*, 154 Mass. 363. That case was decided by only four justices of the court, and Mr. Justice Holmes, who wrote the opinion, stated therein that he had not been able to free his mind from doubt. That case may be distinguished from the one before us, as in that case there was a provision that all the surviving children should take only the income for their lives, and that the principal should go to their children, as previously provided with regard to the original shares. No such clause is in the present will.

It may also be added that the only case cited in *Balch* v. *Pickering* which supports the decision is *In re Bowman*, 41 Ch. D. 525. It is clear that this case is in England no longer an authority for the proposition for which it was cited by Mr. Justice Holmes. See *Harrison* v. *Harrison*, [1901] 2 Ch. 136; *Inderwick* v. *Tatchell*, [1901] 2 Ch. 738, in the Court of Appeals; *S. C.* in the House of Lords, [1903] A. C. 120.

We are therefore of opinion that the decision of the single justice of this court was right.

Decree accordingly.

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MARGARET FLEMING, trustee, *vs.* MARKS I. COHEN.

Suffolk. December 10, 1903. — July 5, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Equity Pleading and Practice, Master's report. *Easement. Party Wall.*

Where the order appointing a master does not require him to report the evidence, and a motion for an order requiring him to do so is denied, if he reports all the facts on which he bases his findings for the purpose of presenting the questions raised and argued before him, it is open to this court to consider whether on his report a finding of the master which includes rulings of law can be sustained.

Owners of adjoining buildings may acquire by prescription mutual easements of support and shelter.

Where a wall dividing two city lots and standing four inches on each has existed for sixty years and a part of it has been treated as a party wall by the owners of both lots, it will be presumed in the absence of evidence to the contrary to have become a party wall throughout its length and the owner of either lot may strengthen and repair the foundation of the wall and build the wall higher than the adjoining house.

A party wall standing one half on each of two adjoining city lots does not lose its character by the fact that it has declined from a vertical line and leans over one of the lots from three to five inches, and the rights of the owners remain the same as if it was straight.

BILL IN EQUITY, filed December 17, 1901, to restrain the defendant from building or completing any wall or other structure over or upon the land of the plaintiff, for an order to remove such structures already built, and for damages.

The case was referred to a master who filed a report. The Superior Court made a decree denying a motion of the defendant to amend the order of reference to the master by ordering him to report such portions of the evidence as either party might request, and ordered that the exceptions to the master's report be overruled and the master's report be confirmed. The Superior Court made a decree giving relief to the plaintiff in accordance with the prayers of her bill; and the defendant appealed.

A reduced copy of the plan mentioned in the third paragraph of the opinion is printed on the following page.

The case was argued at the bar in December, 1903, before *Knowlton*, C. J., *Morton*, *Lathrop*, *Barker*, & *Braley*, JJ., and afterwards was submitted on briefs to all the justices.

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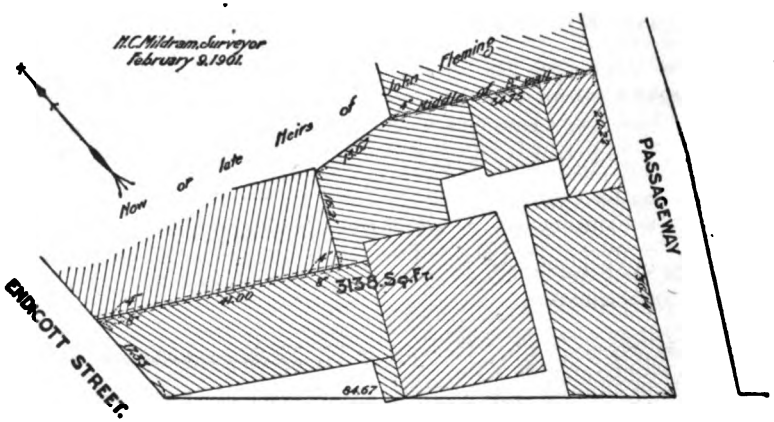
J. E. Macy, for the defendant.

F. C. Allen, for the plaintiff.

BRALEY, J. The parties own adjoining estates, and the defendant has constructed a brick building, a small part of which is on the land of the plaintiff, unless the wall that forms the southwesterly side of the plaintiff's house, and a part of the northeasterly side of that of the defendant, can be considered a party wall which he could properly use in the erection of his building, and this raises the principal question argued by the defendant on his exceptions to the master's report.

The length of the entire wall is thirty-four and seventy-five one-hundredths feet, of which thirteen feet running westerly



from a passageway forms the exterior wall of an ell of a house of the defendant, which was on his land before he began to build.

In the report no details are given of the dimensions or method of construction of the new building, and whether it was an enlargement of his old house or a separate building is not stated, but by the plan the whole area of his lot on this side appears to have been used for this purpose at the date of filing the bill.

When in 1845 John Fleming, under whose will the plaintiff claims title individually and as trustee, built the house on his lot which is still standing, he used this wall of the ell to its full height of two stories as a part of the southwesterly wall of his house, and added a third story; so that when the house was fin-

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ished, the wall for its entire length formed the southwesterly side of it as well as the northeasterly side of the ell.

At that time the land now owned by the defendant was held by Ebenezer Eaton, a predecessor in title, and it may be inferred that because Fleming used the wall of the ell as a part of the construction of his house, and to which he either had no title, or his title was not admitted, that a controversy arose between them, and to settle the dispute, Eaton, April 17, 1845, released and conveyed to Fleming "a certain small strip of land four inches wide and about thirty-five feet long . . . adjoining the southerly line of said Fleming's land, and running from a back passageway that leads westerly from Cross Street under the brick wall lately erected by said Fleming, so as to embrace one-half part, to wit: the southerly [found by the master to be meant for northeasterly] half of said wall", followed by a description by metes and bounds.

Since then, for a period of more than fifty-five years, this portion of the wall has been used by the owners of the adjacent lands for the support of their respective houses.

It is the contention of the defendant that this release was an agreement in form sufficient to make the structure a party wall, but it only purports to define the line of division and contains no language that is susceptible of such a construction, and the master finds "that said release is not in any sense a party wall agreement", and this finding and ruling was right. But he further states "that it has not been made a party wall . . . by implication or by prescription", and it remains to be determined whether, under the facts reported, it became a party wall by implication of law.

The decree appointing a master did not require him to report the evidence, and a request for such an order was afterwards denied, but all the facts on which he bases these findings are apparently reported for the purpose of presenting the principal question raised, and argued before him, and it is open for us to determine on the report whether the last finding which includes rulings of law can be sustained. *Parker* v. *Nickerson*, 137 Mass. 487. *Goodell* v. *Goodell*, 173 Mass. 140, 146, 148.

If before this deed was given there were conflicting claims as to the boundary line, and either of the parties could have con-

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tended that the other had built on his land, or Eaton alone may have been a trespasser; yet under it there can be but one construction as to its effect in determining the boundary of each estate; for a deed poll being given by one, and accepted by the other, was as effectual as if a formal indenture had been signed; and thereafter they occupied and enjoyed their estates within the line established by the deed, and the completed wall as it then stood and in use was divided longitudinally, one half being on the land of each of them. *Newell* v. *Hill*, 2 Met. 180. *Carroll* v. *St. John's Catholic Total Abstinence & Mutual Relief Society*, 125 Mass. 565, 566. *Boston* v. *Richardson*, 13 Allen, 146, 154.

But if each was seised of a moiety of the wall, and nothing more, and no right of support or shelter had been acquired, either could have taken down his house when he pleased without regard to the injury that he might thereby cause his neighbor's property. *Adams* v. *Marshall*, 138 Mass. 228. *McKenna* v. *Eaton*, 182 Mass. 346, 347. Compare *Everett* v. *Edwards*, 149 Mass. 588, 593, *ad finem*.

An extended discussion is not required to show that it is not reasonable to suppose that the parties contemplated such a result, or that either can be found to have intended that the other could at his pleasure practically destroy the wall by removing his half; for there were buildings on both lots at the time, and the wall had become a part of their construction; and if either had owned both estates, and subsequently sold one, or both to different owners under a similar description, there would seem to be no doubt that this portion would be deemed a party wall. *Carlton* v. *Blake*, 152 Mass. 176. *Everett* v. *Edwards*, *ubi supra*.

But where estates are so situated, there is no legal distinction between a mutual grant of separate owners or a grant by one who owns both, as the law implies the reservation of an easement in the half of the wall granted and a grant of a corresponding easement in the half retained, and this part at least of the wall could not thereafter be held to be simply a measure of division, or a boundary between the houses, because it had become physically a part of each, and this determined its character. *Carlton* v. *Blake*, *ubi supra*. *Knight* v. *Pursell*, 11 Ch. D. 412. See also *Rogers* v. *Sinsheimer*, 50 N. Y. 646.

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If no change took place in the ownership of the land by reason of the fact that any portion of it was covered by the wall, so that the several titles to the property remained the same, yet the title of each owner of necessity became subject to the easement of the other to support his building by means of the common structure even though for this purpose not much more than a third was used.

After the prescriptive period has ripened, a division wall between buildings may take on the character of a party wall and be treated as such though the right thus acquired is limited to the exact use of it by the adjoining owner who claims the easement. *Phillips* v. *Bordman*, 4 Allen, 147. . *McLaughlin* v. *Cecconi*, 141 Mass. 252. *Schile* v. *Brokhahus*, 80 N. Y. 614, 618. *McVey* v. *Durkin*, 136 Penn. St. 418.

But the master instead of giving to the defendant the full benefit of this right, which would have been sufficient to support his claim of prescription, limited it to only so much of the wall that supported the floor timbers of the ell, notwithstanding the fact that after the deed the line of division was the centre of the wall, which had incorporated the entire end of the ell.

It would be, however, a forced construction to say that the intention of the owners was to limit their rights to the thirteen feet alone which was in use as a party wall, and while the deed contains no express words reciting the reasons, or specifically stating the purpose for which it was given, the intention of the parties must be gathered from all the facts found and stated in the report. As the wall stood at the time it was a completed structure, and it may well be considered as probable that Eaton would not have consented to the appropriation of any part of his estate, unless he acquired an equivalent right to use the whole wall if he should find it convenient or profitable, or that the twenty-two feet which was in use by only one should be ruined by tearing down the other half, any more than the thirteen feet used by both should be destroyed in the construction of other buildings on his land.

If it is now held that such use by the plaintiff as a part of her building is legally proper, then the defendant, under the finding and ruling made by the master, has only a prescriptive right to use it as a foundation for the wall of the ell, and not only this,

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but he is compelled to have a strip of his land subjected to a perpetual easement in her favor. This is a conclusion a court of equity should hesitate to adopt, for by it the defendant would be obliged to submit to an appropriation of his property, for the use of the plaintiff, without any corresponding right; and if she now invokes the aid of equity to determine and protect her rights of property, she must at the same time recognize his legal and just claims in the use and maintenance of a structure, which must be considered in order for her to maintain her suit, as held in common, but subject to an easement for the sole benefit of her estate, rather than with cross-easements for their mutual benefit.

The length of time the wall has existed, the nature of the use to which it has been put, the fact that the estates meet in its centre, the uniform acquiescence of those holding title to the land in existing and permanent conditions, all afford, in the absence of evidence to control it, a presumption without further proof that the whole wall was intended to be used in common rather than considered as a mere mass of bricks and mortar, owned in severalty, with the usual incidents that may attach to such a tenure. *Phillips* v. *Bordman*, *ubi supra*. *Everett* v. *Edwards*, *ubi supra*. *Campbell* v. *Mesier*, 4 Johns. Ch. 334.

The easement of support afforded by a wall of this nature is not confined to the original building, but extends to and covers a new structure that may be erected and supported by it, and if from use and lapse of time the wall becomes weakened or dilapidated, or is partially destroyed, either proprietor may repair or rebuild it, *Campbell* v. *Mesier*, *ubi supra*, *Partridge* v. *Gilbert*, 15 N. Y. 601, *Eno* v. *Del Vecchio*, 4 Duer, 53, or may deepen its foundations and make additions to it on his own land if its essential character is not changed or impaired, to fit it to bear the weight of a higher building; *Quinn* v. *Morse*, 130 Mass. 317; *Matthews* v. *Dixey*, 149 Mass. 595, 596; *Allen* v. *Evans*, 161 Mass. 485; *Walker* v. *Stetson*, 162 Mass. 86; *Standard Bank of British South America* v. *Stokes*, 9 Ch. D. 68; though in certain cases he may have no right to contribution for any part of the expense even though the wall may have been improved and made more valuable for the use of an adjoining owner. *Walker* v. *Stetson*, *ubi supra*.

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The master finds that since the original wall was built, and presumably after the date of the deed, it has inclined from a perpendicular line, and it may be inferred that it leans over the land of the plaintiff from three to five inches, and it appears that the defendant in using it has strengthened and repaired the foundation, built it higher than the plaintiff's house, and carried it to the top of his new building.

No mention is made in the report of any deterioration or want of repair above the foundation that would authorize the defendant to tear down and replace the wall, and where a change is made that is not required for the purpose of making such repairs, the party who makes them is liable to the adjoining owner for any damages which may result to his property; and if he reconstructs the wall when it becomes necessary, then due care must be used to avoid unnecessary injury to the other owner. *Eno* v. *Del Vecchio*, 6 Duer, 17. *Gorham* v. *Gross*, 125 Mass. 232. *Hughes* v. *Percival*, 8 App. Cas. 443, 447.

But if the defendant could not rebuild the wall because it was sound, nor build a new wall in its place to sustain a building requiring a thicker and stronger support, even though he had acquired a right to its use in common with the plaintiff, yet he is not called upon to surrender this easement because an apparently sound and substantial wall during the half century and more of its existence had inclined to a slight extent towards the land of the plaintiff.

The foundation had not moved, and the defendant used the common wall as he found it, and if it had become such, any of the incidental changes from long use such as a slight inclination either way, if its integrity of construction remained unaffected, would not alter the rights of the parties; for in any wall of this kind these changes may be held to be fairly within the contemplation of the parties, and when they take place, do not operate to destroy the full use of the easement.

If the inclination had been towards the defendant's land it would not be seriously claimed that he could maintain a suit against the plaintiff either at law for damages, or in equity for its removal.

After the foundation had been made more stable, it is a fair inference, in the absence of any adverse finding by the master,

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that it became of sufficient solidity and strength to support the additional weight of the defendant's building, and that in the lawful improvement of his estate this use of it has not caused any injury to the wall itself or damaged the property of the plaintiff. *Matthews* v. *Dixey*, *ubi supra*.

In this situation of the parties, the right to carry up the wall to a height greater than that required to support the house of the plaintiff must be held to be fairly included within the common easement. *Phillips* v. *Bordman*, *Everett* v. *Edwards*, and *Allen* v. *Evans*, *ubi supra*. *Brooks* v. *Curtis*, 50 N. Y. 639, 644.

The finding and ruling of the master "that said thirty-five foot wall is not wholly or in any of its parts a party wall; that it has not been made a party wall by virtue of . . . any agreement, express or implied, by implication or by prescription" cannot be sustained. A majority of the court are of opinion that by reason of this error the twelfth, thirteenth, twenty-seventh, twenty-eighth and twenty-ninth exceptions of the defendant to his report must be sustained, and the decree of the Superior Court overruling them and confirming the report reversed.

Decree reversed.

JOHN H. NELSON *vs.* STATE BOARD OF HEALTH.

Plymouth. May 19, 1904. — July 5, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & LORING, JJ.

Board of Health.

The provision of § 4 of St. 1897, c. 510, giving to any person aggrieved by an order passed by the State board of health under that act the right to appeal and file a petition for a jury within ten days from the service of such order upon him, or, in case of failure to do so by mistake, within thirty days from the service of the order upon him, applies only to orders made under § 3 of that act which are quasi judicial, and does not apply to rules, regulations and orders made by the board under § 1 of the act which are quasi legislative in character. See now R. L. c. 75, § 119.

PETITION to the Superior Court, filed November 1, 1903, under St. 1897, c. 510, § 4, by an owner of a farm on the shores of Assawompsett Pond in Lakeville, alleging that the petitioner

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was aggrieved by certain rules, regulations and orders adopted by the State board of health on December 5, 1901.

The respondent demurred to the petition. In the Superior Court *Hardy*, J. sustained the demurrer and gave judgment for the respondent dismissing the petition. The petitioner appealed.

F. M. Bixby & H. F. Parker, for the petitioner.

R. A. Stewart, Assistant Attorney General, for the respondent.

LORING, J. This is a petition by the owner of land bordering on Assawompsett Pond, which is a great pond.

In the petition it is alleged that on December 5, 1901, the State board of health made certain rules, regulations and orders, a copy of which is annexed to the petition, "for the purpose of preventing the pollution and securing the sanitary protection of the waters" of that and another pond "and their tributaries used by the city of Taunton as sources of water supply"; that said rules, regulations and orders were published on October 23, 1908; that the petitioner is aggrieved by said rules, regulations and orders and appeals therefrom; and that he brings this petition "for a jury to hear, pass upon and determine the questions determined by said State Board of Health in the premises, in making, issuing and publishing said rules, regulations and orders, and that the jury may either alter or annul in full said rules, regulations and orders; and that he may recover his just damages caused to him by the making, issuing and publishing of said rules, regulations and orders, and costs."

The paper annexed, although characterized in the petition as "rules, regulations and orders," is headed at the top "Rules adopted by the State Board of Health." Below is another heading: "Rules and Regulations for the purpose of preventing the pollution and securing the sanitary protection of the waters" of which we have already spoken. In the body of the instrument it is stated that "The State Board of Health, acting under the authority of section 1 of chapter 510 of the Acts of the year 1897, and every other act thereto enabling, hereby makes the following rules and regulations for the purpose of preventing the pollution and securing the sanitary protection of the waters of Elder's Pond and Assawompsett Pond and their

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tributaries, used by the City of Taunton as sources of water supply, which shall remain in force until further order."

Rule No. 1 forbids the maintenance of a privy, urinal, water closet or similar receptacle within forty feet of high water mark of the pond. Rule 14 forbids any person bathing, boating, fishing or putting any animal in the ponds, and rule 15 forbids the cutting of ice on the ponds.

It is alleged by the petitioner that his land has been used as a farm for over one hundred years; that he has various dwelling houses on his land, erected and let for summer dwellings, "with necessary cesspools and outbuildings"; that "his cattle have been accustomed to drink on the shore of said pond"; that "he has been accustomed from time to time to boat and fish and bathe in . . . said pond, . . . and to go upon and cut the ice of said pond; . . . that said cesspools and outbuildings were situated at a sufficient distance from the shore of said pond so that the waters of said pond are not and have not at any time been polluted thereby; that the use of said land for summer dwellings and as a farm was not and has not at any time been a nuisance, and that the waters of said pond are not and have not at any time been polluted by such uses of said premises; that the boating, fishing, bathing, going upon and cutting the ice and drawing of water in, upon or from the waters of said pond and the watering of cattle in said pond were not a nuisance, nor has any one of said uses been a nuisance, and that neither of said uses nor all of them was a source of pollution or caused pollution to the waters of said pond."

The petitioner's contention is that he comes within § 4 of c. 510 of the acts of 1897, which provides that "any person aggrieved by an order passed under this act may appeal therefrom."

The respondent's answer to this contention is that the rules and regulations were in fact made under § 1 of the act, as is stated in the rules themselves, and that the appeal to a jury given by § 4 is only from an order made under § 8 of that act. To this the petitioner's reply is that the language of § 4 is "any . . . order passed under this act," and not any order passed under the next preceding section of the act, and that the authority given by § 1 is to make "rules, regulations and

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orders," and not rules and regulations as distinguished from orders.

It is apparent from what has been stated as to the contentions on one side and the other, that the act is not carefully drawn. We have however no doubt as to the construction of it. In our opinion the construction put forward by the respondent is the true one.

The time within which the appeal is to be applied for indicates, if it does not require, the adoption of that construction. The application for a jury is to be made "within ten days from the service of such order upon" the person aggrieved. An order under § 3 must by the provisions of that section be served on the party against whom it is directed. But rules and regulations adopted under § 1 are not addressed to any one, but are to be published for the information of the public. See St. 1899, c. 308.

Further there is a decisive reason for this construction which goes even more to the substance of the whole matter.

Since the Revised Statutes, town boards of health have been empowered to make "such regulations, as they may judge necessary for the public health and safety, respecting any articles which are capable of containing or conveying any infection or contagion, or of creating any sickness, when such articles shall be brought into or conveyed from their town, or into or from any vessel." Rev. Sts. c. 21, § 6. These regulations are to be published in some newspaper in the town, or, where there is no newspaper, by posting them in some public place. Rev. Sts. c. 21, § 8. Both Rev. Sts. c. 21, §§ 6, 8, were taken from St. 1816, c. 44, §§ 5, 6, which then applied to the city of Boston only. See Commissioner's Report, note to c. 21. The provisions of Rev. Sts. c. 21, § 6, were re-enacted in Gen. Sts. c. 26, § 5, (Pub. Sts. c. 80, § 18;) the provisions of Rev. Sts. c. 21, § 8, in Gen. Sts. c. 26, § 6, (Pub. Sts. c. 80, § 19.) The character of the action of a town board of health when it acts under these sections was considered in *Salem* v. *Eastern Railroad*, 98 Mass. 431. It was there said that regulations adopted under these sections "belong to that class of police regulations to which all individual rights of property are held subject, whether established directly by enactments of the legislative power, or by its

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authority through boards of local administration." See also *Sprague* v. *Dorr*, 185 Mass. 10. In a word, they are quasi legislative in their character. Such regulations were not served upon any one, but notice of them had to be given to the public before persons could be held in fault for a disregard of their requirements. See *Salem* v. *Eastern Railroad*, 98 Mass. 431, 443.

But in addition to their power to make general regulations which might be necessary for the public health, town boards of health were empowered to examine into the existence of any specific case of nuisance, filth or cause of sickness dangerous to the public health, Rev. Sts. c. 21, § 9, and to make an order that it be removed, Rev. Sts. c. 21, § 10; and an order made by the board when acting under this section had to be served on the party against whom it was directed. This is implied in Rev. Sts. c. 21, §§ 10, 11; it was expressly provided for in case of cities in St. 1849, c. 211, § 4, and was expressly made applicable in case of towns by the Gen. Sts. c. 26, §§ 8, 9. The provisions of Rev. Sts. c. 21, § 9, were re-enacted in Gen. Sts. c. 26, § 7, (Pub. Sts. c. 80, § 20;) and those of Rev. Sts. c. 21, § 10, in substance in Gen. Sts. c. 26, §§ 8, 9, (Pub. Sts. c. 80, §§ 21, 22.) Action under these sections is quasi judicial. *Salem* v. *Eastern Railroad*, 98 Mass. 431, 443, 444.

The State board of health was given a similar quasi judicial power with respect to the pollution of sources of water supply for cities and towns by St. 1878, c. 183. By § 1 of that act the discharge of human excrement was forbidden into a source of water supply, or into any water, river or stream within twenty miles above the point whence the supply is taken; by § 2 the direct or indirect discharge was forbidden into such water supply of any polluting matter of such quality and amount as either by itself or in connection with other matter should corrupt or impair the quality of the water for domestic use or render it deleterious to health. By § 4, power was given to the board to order a person violating §§ 1 or 2 to remedy the pollution; an order under this act had to be served on the offending person and from it he had an appeal to a jury. St. 1878, c. 183, § 6. By § 5, jurisdiction was given to the Supreme Judicial Court to enforce the order of the board, and by § 6, it was provided that pending an appeal to a jury the pollution against which the

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order was issued should not be continued contrary to the order of the board. These sections of St. 1878, c. 183, are the origin of the power given to the board of health by St. 1897, c. 510, § 3. These provisions of St. 1878, c. 183, were re-enacted in Pub. Sts. c. 80, §§ 96–100. But this power was subsequently taken away in 1884, (St. 1884, c. 154, § 2,) and then was restored to the board in 1890. St. 1890, c. 441.

Power to make general regulations for the purpose of preventing the pollution and securing the sanitary protection of sources of water supply was first given to the State board of health in 1897, St. 1897, c. 510, § 1, and provision for the publication of such regulations was made two years later. St. 1899, c. 308.

It is apparent that in giving to the State board of health power to make rules, regulations and orders the Legislature intended to invest it with a power similar to the power given to town boards of health to make regulations. And we are of opinion that rules adopted by the State board of health under St. 1897, c. 510, § 1, are quasi legislative; that orders made by the board under § 3 of that act are quasi judicial in character; and that the appeal to a jury given by § 4 is from an order made by the board in the exercise of its quasi judicial powers and has no application to regulations made by it in the exercise of its quasi legislative powers.

The correctness of this conclusion is borne out by the provisions of the Revised Laws. The language of the act is changed there. By the terms of R. L. c. 75, § 119, a jury can be claimed only in case of "an order passed under the provisions of the preceding section," which is in fact a re-enactment of St. 1897, c. 510, § 3.

Petition dismissed.

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CLARA M. GILKIE *vs.* FRANKLIN F. MARSH, executor, & others.

Suffolk. March 10, 11, 1904. — July 21, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Devise and Legacy, Construction. *Estate Tail. Words*, "Die without issue."

In a will executed and proved before St. 1888, c. 273, now R. L. c. 134, § 5, a devise to a certain person and if he shall "die without issue" to the testator's heirs passes an estate tail.

Under successive statutes since 1791, now R. L. c. 127, § 24, an entail can be barred by a deed in common form.

A testator devised one half of the residue of his estate to a certain niece, providing that if she should die and her husband should survive her the property should go to her husband and after his decease to his children, and that if he should leave no children it should go to the testator's heirs. At the testator's death, the niece, her husband and a son of the niece and her husband were living. The niece's husband died before her and later the son died intestate and unmarried during his mother's lifetime. *Held*, that if the niece took a fee subject to be divested, it had become absolute, and that if she took a life estate with a remainder for life in her husband and a remainder in fee to such of his children as survived him, the remainder vested absolutely in the son on the death of his father and on the death of the son intestate and unmarried passed to his mother as his heir giving her the whole estate in fee.

BILL IN EQUITY, filed May 6, 1903, by one of the heirs at law of John G. Terhorst, late of Boston, deceased testate, in behalf of herself and the other heirs at law of that testator, against certain persons holding under a deed from George Wilner and against the executor and the devisees under the will of Clara Marsh, deceased, praying for the establishment of the alleged title of the plaintiff and the other heirs at law of John G. Terhorst to certain real estate as devisees under item twenty-two of his will, which item, with the exception of an additional clause appointing executors, is quoted in full in the opinion.

In the Superior Court the case came on to be heard before *Richardson*, J., who by agreement of all the parties reserved it upon the pleadings and an agreed statement of facts for determination by this court.

John G. Terhorst died August 19, 1870. His will was dated November 2, 1867. On October 31, 1870, George Wilner being

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unmarried conveyed by deed his undivided interest in the premises to Anna Maria Bockmann. On May 6, 1881, Anna Maria Bockmann conveyed her interest in the premises to William H. Marsh, husband of Clara Marsh. William H. Marsh died on December 28, 1883. He left one child, Waldon G. Marsh, who died unmarried and intestate on February 4, 1894, leaving as his sole heir at law his mother Clara Marsh. Clara Marsh died on May 22, 1902, testate.

A. P. Worthen, for the plaintiff.

P. A. Atherton, for the defendants Thea McElroy and others.

W. H. Powers & H. H. Folsom, for the executor under the will of Clara Marsh.

BRALEY, J. It is manifest on an examination of the will under which the parties claim title to the real estate described in the bill that the testator expressed by its provisions a carefully matured plan for the disposition of his property, and in the carrying out of this design a large number of pecuniary legacies are first given to relatives either outright or in the form of annuities in terms carefully limited, followed by three bequests for religious and charitable purposes, with specific gifts to two of his nephews, and in each instance he states in well chosen language the nature and extent of the bequest; after this has been done and in completion of his purpose he provides for a nephew and niece not previously mentioned, to each of whom he gives one half of the residue of his estate.

This residuary clause is now submitted for our interpretation, and so much of it as affects the rights of the parties is contained in these words: "Item 22. I give and bequeath to my nephew George Wilner and to my niece Clara Marsh (maiden name Wilner) wife of William H. Marsh, all of the residue of my property, both real and personal and mixed after the within named legacies are paid. Should George Wilner die without issue, it is my will that his part of this last named legacy shall be divided equally among my heirs. Should my niece Clara Marsh die and her husband should survive her, then it is my will that her portion of the last named legacy shall go to her husband. After his decease to go to his children. If he should leave no children then it shall be divided equally among my heirs."

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If no modification of the first sentence of this paragraph is made by the context, the words used import and are ample to give to each a fee simple as tenants in common. Gen. Sts. c. 92, § 5. *Leland* v. *Adams*, 9 Gray, 171. *Lincoln* v. *Lincoln*, 107 Mass. 590. *Crossman* v. *Field*, 119 Mass. 170. *Goddard* v. *Whitney*, 140 Mass. 92, 100. *Smith* v. *Rice*, 183 Mass. 251. *Dana* v. *Dana*, 185 Mass. 156, 158.

But if the whole article is to be construed to give effect if possible to every part, the language used differs in its reference to each devisee, and a construction which disposes of one branch of the title may not be found sufficient to define the nature and extent of the other, and the first inquiry presented is to what extent the words "should George Wilner die without issue . . . his part of this . . . legacy shall be divided equally among my heirs," qualify and limit the estate given to him.

The primary object of the testator was to make provision for his unmarried nephew, and he may properly have considered that if he married and had issue they should take in succession and enjoy the benefit of this portion of his estate; and it is the contention of the plaintiff that if no children were born to be benefited he then intended to make a full disposition of the estate himself, and thus gave a fee to the first taker limited upon his dying without lawful issue living at the time of his death, with a remainder in fee to the heirs of the testator, which would immediately vest if no children survived. Yet to adopt this where no language is used that affords the slightest modification of the phrase "die without issue" would entirely disregard the use of words which at the testator's death and unaffected by St. 1888, c. 273, now R. L. c. 134, § 5, had acquired by judicial determination a definite legal meaning, and by construction are said to have become a rule of property, and when employed by the testator must be treated as used by him in their technical sense. *Ide* v. *Ide*, 5 Mass. 500, 501. *Wight* v. *Thayer*, 1 Gray, 284, 286. *Allen* v. *Ashley School Fund*, 102 Mass. 262, 264. *Brown* v. *Addison Gilbert Hospital*, 155 Mass. 323, 326. *Siders* v. *Siders*, 169 Mass. 523, 525. 4 Kent Com. 278, n. 1, where many of the cases are collected.

And when he provided that the estate should go over, this meant that if George Wilner left a child or children surviving

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him such child or children should take the estate after their father as his heirs; and if the whole clause is construed, the estate in fee simple of the first devisee is cut down to an estate in fee tail, which is created by implication, as these words are equivalent to "without leaving heirs of the body," and contemplate what is known as an indefinite failure of issue and it cannot take effect as an executory devise because void for remoteness. *Parker* v. *Parker*, 5 Met. 134. *Hayward* v. *Howe*, 12 Gray, 49, 51. *Nightingale* v. *Burrell*, 15 Pick. 104, 111. *Hall* v. *Priest*, 6 Gray, 18. *Loring* v. *Blake*, 98 Mass. 253, 259.

By our laws since St. 1791, c. 60, § 1, one of the incidents attaching to such an estate is the right of a person seised of lands thus held to bar the entail by a deed in common form, and when the tenant in tail conveyed his undivided interest in the various parcels of real estate devised to him by his uncle, the deed operated to cut off any remainder expectant thereon, and vested in the grantee an indefeasible title which is now held by the defendants. Rev. Sts. c. 59, § 8. Gen. Sts. c. 89, § 4. Pub. Sts. c. 120, § 15. R. L. c. 127, § 24. *Hall* v. *Thayer*, 5 Gray, 523. *Collamore* v. *Collamore*, 158 Mass. 74.

Nor is any discussion required of the litigation that arose after George Wilner's death to have the deed declared invalid because fraudulently obtained, and the property decreed to belong to the heirs of the testator, and which was terminated by a decree establishing the conveyance; for the plaintiff does not renew the original contention that the deed was procured by fraud, or claim that it was not sufficient to pass such title as the grantor had, and bar the entail, if under our construction of the devise an estate tail was created.

But if this disposes of one moiety of the residue, the part devised to Clara Marsh does not fall within it, as the language used, neither by its form of expression, nor by implication, imports an intention to limit the estate to the heirs of her body.

At the testator's death, his niece, her husband and son, were living, and as they are all included in the devise, his intention that this property should go to the family in some form becomes reasonably clear; but it is susceptible of more than one construction, and as each leads to the same conclusion there is no

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occasion to decide whether one is to be preferred to the other as the more correct exposition.

It can be said that when he devised a fee by words which gave to her an absolute estate, he intended that her interest should vest at his death, as this is followed by substitutional provisions for the disposition of the estate in the event of her dying before her husband, as well as, upon his death, before their son, who then would be the last survivor, if there were no other children living. *Howland* v. *Slade*, 155 Mass. 415, 416.

By the words "should my niece Clara Marsh die," his purpose was to prevent a lapse of the devise if she should not outlive him, in which event the other members of the class would take in the order of succession; and these words therefore may be construed as meaning that the estate was to vest if she survived the testator, and, having survived him, she took under the will an estate in fee. *Briggs* v. *Shaw*, 9 Allen, 516. *Crossman* v. *Field*, 119 Mass. 170. *Goodwin* v. *McDonald*, 153 Mass. 481. *Seaver* v. *Griffing*, 176 Mass. 59, 63.

If, under any view, she took a fee in the first instance, subject to be divested upon the happening of subsequent events, the expectant estate of the heirs would then depend on the failure of children, which event did not occur. As the son did not take unless he survived his father, so the latter acquired no title if he died before his wife; and, as she survived him, the contingency upon which her estate would have been divested never arose, and she held the fee at her death. *Brightman* v. *Brightman*, 100 Mass. 238. *Kimball* v. *Tilton*, 118 Mass. 311.

Or by the other construction, the estate given may be treated as limited to his niece for life, remainder for life to her husband, with a remainder in fee to such of their children as survived their father.

If, instead of limiting the remainder after the life estates to the surviving children of his nephew, the testator had used the word "heirs," it would be doubtful whether he did not intend that those who should take were to be ascertained as of the death of the second life tenant; but their son, and, as it eventually appeared, the only child of the marriage, was living at the testator's death, and comes within the description employed, and as he intended to provide for him, the son took a remainder in

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fee subject to the contingency that it would go to the testator's heirs if he died before his father, and that his interest might be affected by the birth of brothers or sisters, who, if they also survived, would share the fee with him. But when he survived his father, the estate became absolute, subject to the life estate of his mother, and as he died intestate and unmarried in her lifetime, she took the fee upon his death as his heir. *Belcher* v. *Burnett*, 126 Mass. 230, 231. *Putnam* v. *Story*, 132 Mass. 205. *Butterfield* v. *Reed*, 160 Mass. 361, 368. *Shaw* v. *Eckley*, 169 Mass. 119. Pub. Sts. c. 125, § 1, cl. 4. See also *Gardiner* v. *Guild*, 106 Mass. 25.

As the heirs at law never became seised, under the twenty-second article of his will, of any part of the real estate of the testator, the bill cannot be maintained, and must be dismissed.

Bill dismissed with costs.

CITY OF TAUNTON *vs.* LEMUEL P. TALBOT.

Bristol. October 27, 1903. — September 6, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Pauper. Contract.

Under our statutes a pauper cannot recover from a city or town for services rendered by him as an inmate of its almshouse.

Where a city or town maintains a public almshouse, keeping no accounts with an individual inmate, and no expenses are shown to have been incurred particularly for him, and it merely appears that the inmate received support in the almshouse and at the same time rendered services in diminution of the general expenditure equal in value to the cost of his support, the city or town can maintain no action under St. 1882, c. 113, R. L. c. 81, § 9, against such former inmate of its almshouse for money expended for his use.

CONTRACT, by the city of Taunton, under St. 1882, c. 113, substantially re-enacted in R. L. c. 81, § 9, against a former inmate of its almshouse, for board and care from January 15, 1897, to September 3, 1902, at $2 a week, amounting to $586. Writ in the First District Court of Bristol dated August 16, 1902.

The defendant filed a declaration in set-off alleging that the plaintiff owed him $586 for work done by the defendant for the

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plaintiff according to an account annexed, in which he charged $2 a week for his services.

On appeal to the Superior Court the case was heard by *Hardy*, J. upon an agreed statement of facts, the substance of which is stated in the opinion. The judge found for the plaintiff and ordered judgment to be entered for it in the sum of $602.41. He found that the defendant was not entitled to recover on his declaration in set-off and gave judgment for the plaintiff thereon. The defendant appealed.

F. P. Lincoln, for the defendant.

J. B. Tracy, for the plaintiff.

KNOWLTON, C. J. Under the St. 1882, c. 113, "Any city or town which incurs expense for the support of a pauper having a settlement therein may recover the same against such person, his executors or administrators, in an action of contract for money paid, laid out and expended for his use." This statute is re-enacted with immaterial changes in the R. L. c. 81, § 9.

This case is submitted on an agreed statement of facts, by which it appears that the defendant, being in need of relief, became an inmate of the plaintiff's almshouse about January 15, 1897, and has remained there ever since. He had no money or property, and has had none since, except a small sum recently left for him by a relative, which is in the hands of the person summoned as trustee. The city has kept no account of money paid for the defendant's use, but it makes a claim to $2 per week for board, which is founded upon the average cost of the board of all the inmates of the almshouse during the period of the defendant's presence there. "The defendant has been a valuable man at the almshouse, being steady and industrious, having charge of the barn, with general oversight of the horses, cows, etc., for which duties he had peculiar aptitude, and has performed services fully commensurate with the amount sought to be recovered by the city." The only question in the case is whether upon these facts, the city has incurred expense for his support within the meaning of this statute.

The services of the defendant were properly rendered under the authority of law. St. 1895, c. 445, § 2. R. L. c. 81, § 23. See also R. L. c. 81, § 8; c. 30, §§ 1, 3. For such services he has no cause of action, and there can be no recovery under his

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declaration in set-off. If the city could show specific payments of money made on his account, the case would stand somewhat differently. All that appears from the agreed statement is that he shared the benefits of the plaintiff's almshouse, the expenses of whose maintenance were paid by the plaintiff, and at the same time, as an inmate thereof, he rendered valuable services which presumably diminished the outlay for expenses of maintenance as much as in other respects his presence increased it. Looking at the whole expenditure for maintaining the almshouse while he was an inmate of it, it seems to have been no more than if he had never been there.

There are forcible arguments in support of a different construction of the statute, as applied to cases like this, and we do not determine what the rule should be if the facts were slightly different. But where a public almshouse is maintained and no accounts are kept with an individual inmate, and no expenses are shown to have been incurred for him particularly, and nothing appears except that he has received support in the almshouse and at the same time has rendered services in diminution of the general expenditure to an amount in value equal to the cost of his support, we are of opinion that no expense is shown to have been incurred for his support for which there can be a recovery under this statute.

Judgment for the defendant.

JACKSON H. TOWNSEND *vs.* GEORGE WHEATLAND (sole defendant by amendment).

Suffolk. November 10, 1903. — September 6, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Practice, Civil, Parties. *Abatement.*

In an action of contract against two defendants jointly, if the declaration is amended by striking out the name of one of the defendants and the trial proceeds against the other, and there is evidence of a joint promise made to the plaintiff by the two original defendants, a verdict for the plaintiff will be sustained, as the remaining defendant could take advantage of the non-joinder of the other only by a plea in abatement.

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CONTRACT against George Wheatland and Frederick C. Warren jointly, alleging that the defendants owed the plaintiff a balance of $2,338, under an alleged oral contract for doing the plastering of two houses on Beacon Street in Boston, with an additional count on an account annexed for $32.50. Writ dated November 29, 1899.

In the Superior Court the case first came on for trial before *Maynard*, J. The defendant Warren rested on the opening statement of the plaintiff's case, and no further evidence was admitted against that defendant. The plaintiff's testimony was taken as against the defendant Wheatland, until the judge ruled that upon the opening as then made and the evidence as then offered the plaintiff could not proceed against the two defendants jointly, and that the plaintiff might elect which defendant he would proceed against and discontinue as to the other. The plaintiff thereupon elected to discontinue as to the defendant Warren, and the judge ordered the case to be continued, and allowed the plaintiff to file an amended declaration against the defendant Wheatland.

Later the case was tried before *Gaskill*, J., who refused to order a verdict for the defendant and submitted the case to the jury. The jury returned a verdict for the plaintiff in the sum of $2,664.55, and in answer to a special question submitted to them by the judge found "that in August Wheatland agreed to pay." The judge reported the case for determination by this court upon the terms of reservation quoted in the first paragraph of the opinion.

H. Warner, for the defendant.

R. W. Light, for the plaintiff.

KNOWLTON, C. J. This case comes before us on a report which concludes as follows: "There was no other material evidence in the case. The defendant requested me to rule that there was no evidence to justify a verdict for the plaintiff, which I refused, and submitted the case to the jury under instructions, . . . and the defendant duly excepted to my refusal to give said rulings. . . . If a verdict should have been directed for the defendant, judgment shall be entered for the defendant. If upon the evidence the jury was justified in finding for the plaintiff in the amount of the verdict, judgment is to be entered on the ver-

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dict. If upon the evidence the jury was justified in finding only for a less sum than the verdict, judgment is to be entered for that sum. Otherwise, judgment is to be entered for the defendant."

We understand the report as intended to submit to the court the whole evidence, and the questions of law above stated, for a final decision of the case, without regard to other rulings made or to instructions given at the trial. We are of opinion that there was evidence tending to show that the defendant and Warren contracted jointly with the plaintiff for the work which he undertook to do, and jointly agreed to pay him for it. There is much evidence that has an opposite tendency, but the plaintiff testified in a variety of forms that he always understood this to be the contract, and he testified to dealings with Warren and conversations with the defendant on which such an understanding properly might be founded. At the end of the cross-examination of the plaintiff, the judge put a question indicating that he thought there was evidence of a joint contract, as follows: "Assuming that a joint contract was made, and that the plaintiff regarded it so, and continued to, and looked to both of these men instead of one, according to his statement, until after the work was finished, can you proceed against one?" Upon one branch of the case he also submitted to the jury the question whether there was a contract between the plaintiff on one side and Warren and the defendant on the other.

The case was submitted to the jury only on the question whether the defendant made an independent contract with the plaintiff when the work was partly done, which superseded the original contract made between the plaintiff and Warren, and whether the plaintiff did the remainder of the work relying upon the defendant's contract alone. But if the original contract was between the plaintiff on one side and the defendant and Warren acting in a joint undertaking on the other, the plaintiff can recover on a single count against the defendant alone. The non-joinder of Warren as a defendant can be used as a defence only when it is pleaded in abatement. *Wilson* v. *Nevers*, 20 Pick. 20, 22. *Bliss* v. *Bliss*, 12 Met. 266. *Kendall* v. *Weaver*, 1 Allen, 277, 279. *Leonard* v. *Speidel*, 104 Mass. 356. *Taft* v. *Church*, 164 Mass. 504, and cases cited. This view of the case does not

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seem to have been presented at the trial. The proceedings and rulings at a former trial before another judge, when the writ was amended and the case was continued, are immaterial.

Upon our construction of the report, inasmuch as there was evidence sufficient to justify the jury in finding for the plaintiff for the whole amount of the claim, there must be a

Judgment on the verdict.

FRANK W. MASON *vs.* HARRY C. SPILLER.

Suffolk. January 14, 1904. — September 6, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Frauds, Statute of. Partnership.

Two partners dissolving a partnership, with only two bonds as assets and with no debts except for the purchase money for the two bonds, which had been advanced by one of the partners, orally agreed that each partner should take one of the bonds at its cost price, the partner who had advanced the purchase money agreeing to carry the bond of the other partner for a week or two to enable him to sell it or raise the money to pay for it. On his failing for several months to do either, he who had advanced the money sold the bond at public auction after notice to his former partner, and, the price realized being less than the firm paid for it, sued his former partner for the difference. *Held*, that this was not a contract of sale within the statute of frauds, and that the plaintiff should have judgment.

LATHROP, J. The parties to this action had been associated together as partners, and while so associated had bought two bonds of a railroad company. The firm had no capital and the plaintiff advanced the money for the purchase, and retained the bonds as security. Subsequently the firm dissolved. It had no debts or accounts receivable. Its only liability was the debt due to the plaintiff for the bonds. In this state of affairs, the parties divided some small articles of the partnership property and entered into an oral agreement by which the plaintiff was to take one of the bonds and the defendant the other at the cost price, the plaintiff agreeing to carry one of the bonds for the defendant for a week or two, in order that the defendant might have time to find a purchaser, or otherwise raise the money. The plaintiff

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carried the bond for several months, and made reasonable efforts to get the defendant to take it off his hands. Subsequently, the plaintiff notified the defendant that the bond would be sold by public auction on a certain day, unless the defendant took it up. The bond was sold and brought less than the firm paid for it; and this action is brought to recover the difference.

The judge ruled that the agreement was a contract for the sale of goods, wares and merchandise within the statute, and found for the defendant. At the request of the plaintiff, the judge reported the case for our consideration.

We are of opinion that the case was not within the statute of frauds. Pub. Sts. c. 78, § 5, now the R. L. c. 74, § 5. The two railroad bonds were bought by the firm and were its property, subject to the lien of the plaintiff for the price. On the dissolution of the firm, there was no contract for the sale of the bonds from one partner to another, but they still remained as assets of the firm to be divided as the former partners might agree. This might be done by an oral agreement as well as by a written one. The plaintiff did not agree to sell one of the bonds to the defendant, but it was agreed that each partner should take a bond, and that the plaintiff should hold the defendant's bond, or "carry it for him," to use the language of the report. This was to secure to the plaintiff his lien on the bond. The transfer of title between the parties was executed and not executory. As there was no contract of sale, the case is not within the statute. See *Bullard* v. *Smith*, 139 Mass. 492.

Judgment for the plaintiff.

C. B. Sias, for the plaintiff.

B. C. Moulton, for the defendant.

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CHARLOTTE BEAN, executrix, & others *vs.* COMMONWEALTH.

Middlesex. March 3, 1904. — September 6, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Trust. Executor.

Where the effect of the provisions of a will is to subject property in the hands of an executor to certain trusts, and no trustee is named, the executor on qualifying as such holds the property as trustee.

An executor, who as such under the terms of a will holds property in trust for his own benefit during a certain term with authority at the end of the term, or sooner at his discretion, to sell the property and distribute the proceeds among himself and others, takes as executor a fee in the real estate thus held.

The owner of a wharf property, with sheds and buildings thereon, who carried on a coal, hay and grain business there, died leaving eight children, and by his will appointed his daughter C. executrix, and directed and authorized her as executrix to carry on his business for five years, or for any shorter term she might deem best, at the risk of his estate for her own benefit, she paying personally for repairs, insurance and taxes, and directed that at the end of the five years she should sell the business and the land and buildings and distribute what then remained of his real and personal estate equally among all his children. The testator's daughter C. qualified as executrix. She was not named as trustee in the will and was not so appointed by the Probate Court. While she was carrying on the business under the terms of the will, the land and buildings were taken by the metropolitan park commissioners under St. 1893, c. 407. On a petition by C. as executrix and by her and the other children of the testator individually for damages under that act, it was *held*, that the property vested in C. as trustee by virtue of her appointment as executrix, and that holding the property in fee she as executrix alone could prosecute the petition for damages.

PETITION, filed November 11, 1901, by Charlotte Bean, executrix under the will of James Bean, late of Medford, and by the said Charlotte individually and seven other persons, her brothers and sisters, all children of James, for damages under St. 1893, c. 407, for the taking by the metropolitan park commissioners of certain wharf property on Mystic River.

At the trial in the Superior Court *Bishop*, J. excluded certain evidence against the objection and exception of the petitioners Elizabeth Bean Lane, James Harvey Bean and Arthur Benjamin Bean, and ruled that Charlotte Bean, in her capacity as executrix under the will of James Bean, was the only person entitled to maintain a petition to recover damages for the taking

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of the land as alleged in the petition. He ordered a verdict for the respondent as against Elizabeth, James and Arthur above named, and ordered a verdict for the petitioner Charlotte Bean in her capacity as executrix in the sum of $20,000. The petitioners Elizabeth, James and Arthur alleged exceptions.

The material portions of the will of James Bean were as follows:

"Seventh: I authorize and direct my said daughter, Charlotte Bean, as executrix, to carry on my business of selling coal and grain and other articles at my wharf off 50 Main Street, in said Medford, for the term of five years from my decease, or for any shorter term from my decease, according as she in her uncontrolled discretion may deem best. In order to furnish her, the said Charlotte, with the capital necessary for the carrying on of said business, I direct that she have the two funds or sums arising from the above mentioned sale of my lot on Salem Street, and from the collection or sale of the said William P. Treat mortgage, all of the two said funds or sums to be used as the said Charlotte, in her uncontrolled discretion, shall deem best, in the conduct of said business. And if she considers it necessary at any time to have more capital for carrying on said business, I hereby authorize and direct her, in her discretion, to apply the assets of my estate so far as needed for that purpose. In the conduct of said business, and in the matter of the receipts and disbursements made in connection with or in the course of said business, it is my will that the said Charlotte shall have absolute power, uncontrolled by any one, and without accounting to any one. And said business shall be carried on at the risk of my estate, and not at the risk of said Charlotte personally. I direct that the said Charlotte at her own personal expense, shall keep the buildings at said number 50 Main Street in repair, and maintain the personal property in use in said business in as good condition reasonable wear and tear excepted as the same may be in at my decease, and that she pay the insurance and taxes on the said premises so long, only, as she carries on the said business. I direct that the profits, if any, of said business for the said term of five years, or, if discontinued before five years, then for such shorter term, shall belong absolutely to the said Charlotte personally. The said Charlotte may, at any time before the ex-

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piration of the said five years, discontinue the said business, if she in her uncontrolled discretion, sees fit so to do. I direct that she be required to pay no rent for said premises used for my business, nor compensation for the use of the personal property used in carrying on the same.

"Eighth: At the end of five years from my decease, I direct my said executrix to sell the assets and good will of the said business and to sell the said premises number 50 Main Street. And I direct that the proceeds of the sale of the assets and good will of said business, and of said land and building, and what may then remain of my real and personal estate, shall be divided equally among all my children, namely, Charlotte Bean, Mary Wilson, Elizabeth Lane, George H. Bean, James Harvey Bean of Pocatello, Idaho, Arthur Benjamin Bean, of Pocatello, Idaho, Frank E. Bean, of Chicago, Illinois, and Charles E. Bean, of Charlestown, Massachusetts, the issue of any deceased child to take by representation the share which that child would have received if living at the time above fixed for the distribution. If the said Charlotte should die before the expiration of the said term of five years from my decease, I direct that the assets and good will of the business and the land and buildings at said 50 Main Street be sold as soon as may be, and that the distribution as above set forth be made at once.

"I nominate my said daughter, Charlotte Bean, to be the executrix of this will, and I request that she may be exempt from giving a surety or sureties on her bond as such executrix, or on any bond or bonds that may be required of her."

T. W. Proctor, for the petitioners Elizabeth B. Lane, James H. Bean and Arthur B. Bean.

R. G. Dodge, Assistant Attorney General, for the Commonwealth.

MORTON, J. This is a petition for the assessment of damages for the taking, by the metropolitan park commissioners, of certain lands in Medford under St. 1893, c. 407. The date of the taking was November 29, 1899. The land formerly belonged to one James Bean, and consisted of wharf property on Mystic River, with sheds, buildings, etc., where he had carried on for many years a coal, hay and grain business. James Bean died testate June 19, 1899. His will was duly proved, and his daughter

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Charlotte was duly appointed executrix. The petitioners are all the heirs at law, next of kin and devisees of James Bean, and the petition is signed by Charlotte Bean as executrix as well as in her individual capacity. The question is whether Charlotte Bean as executrix has the right to maintain a petition to recover damages for the land taken and to settle the case as seems to her advisable, or whether the petition should be brought and prosecuted by the heirs at law and next of kin. The judge ruled that Charlotte Bean in her capacity of executrix was the only person entitled to maintain the petition, and directed a verdict for her as executrix in the sum of $20,000, the amount agreed upon in settlement between her and the Commonwealth if she had the power to settle, and directed a verdict for the Commonwealth as against the other petitioners. The case is here on exceptions by three of the petitioners to these rulings, and also to certain rulings in regard to the exclusion of evidence which become immaterial if the ruling that Charlotte is the only person entitled to maintain the petition is right.

We think that the rulings were right. Without reciting here the provisions of the will, it seems to us that the effect of them is to vest the property in Charlotte Bean as trustee by virtue of her appointment as executrix. She is not named in the will as trustee and has not been so appointed by the Probate Court. But it is not necessary to constitute her a trustee that she should have been so named or appointed. If the effect of the provisions of the will is to subject the property in her hands as executrix to certain trusts to be carried out by her she will be deemed to hold the property as trustee by virtue of her appointment as executrix. *Carson* v. *Carson*, 6 Allen, 397. And we think, as already observed, that such is the effect of the disposition of the property by the will. She is given power to carry on the business in her uncontrolled discretion at the expense of and with funds belonging to the estate for her own benefit for five years or such shorter time as she may choose, and is given the absolute and entire beneficial use of the property in question subject only to the payment of taxes, repairs and insurance during that time. At the end of five years she is directed to sell the property and divide the proceeds equally amongst the testator's children, including herself, the issue of any deceased child taking by right

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of representation the share which that child would have taken if living at the time of distribution. And if she should die before the expiration of the five years then the property is to be sold as soon as may be and the proceeds distributed as above. In other words, as it seems to us, the property is given to her in trust to use it for her own benefit for five years or less as she may elect, and at the expiration of five years to sell it and divide the proceeds amongst those who shall answer the description. If the property had been put by the testator into the hands of a third person with directions to permit his daughter Charlotte to have the entire and uncontrolled use and benefit of it on the terms named for five years with the right to carry on the business with capital furnished by him at the risk of the estate, and at the end of five years to sell and dispose of it and divide the proceeds amongst his children and their issue, there can be no doubt, we think, that such person would have taken and held the property as trustee. It can, of course, make no difference in principle that the property was put into the hands of the daughter instead of a third person, and it is more commensurate with what is required of the trustee that the fee should have been intended to pass to and should be held to have passed to her, than that the will should be construed as simply directing the trustee to sell and distribute the proceeds with the result that the fee would vest in the heirs at law subject to be divested by a sale. It is well settled that trustees take that quantity of estate which the exigencies of the trust require. *Sears* v. *Russell*, 8 Gray, 86. *Cleveland* v. *Hallett*, 6 Cush. 403. We are of opinion that the petitioner Charlotte took the fee as trustee, and that the petition could only be rightly brought and prosecuted by her in her capacity of executrix.

Exceptions overruled.

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WILLIAM DUCHEMIN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 15, 1903. — September 7, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Street Railway. Carrier, Of passengers. *Negligence*, On highway.

A foot traveller on a highway who is approaching and intending to board a street car, which in response to a signal from him has stopped to receive him, is not a passenger on the car before he reaches it, and until he begins to enter the car the company operating it owes him only the duty which it owes to all persons lawfully upon the street.

TORT for injuries caused by the trolley pole and a sign of a car of the defendant falling upon the plaintiff, as he was about to enter the car. Writ dated September 5, 1900.

At the trial in the Superior Court *Bell*, J. refused to make the rulings requested by the defendant which are stated in the opinion, and gave other instructions which also are stated in the opinion. The jury returned a verdict for the plaintiff in the sum of $5,400, from which the plaintiff by requirement of the judge afterwards remitted $1,400. The defendant alleged exceptions.

C. F. Choate, Jr., for the defendant.

A. H. Russell, for the plaintiff.

BARKER, J. The action is for a personal injury occasioned by the fall of a trolley pole and car sign. The case stated in the declaration is that as the car approached the plaintiff he went toward it for the purpose of entering it having given the motorman in control notice of his intention so to become a passenger, and that as he was about to get on the car the trolley pole fell striking a sign upon the car and the pole and sign struck the plaintiff, he being in the exercise of due care and the defendant negligent.

At the trial the testimony of the plaintiff and of one passenger on the car tended to show that when the pole and sign fell the car was stationary, and the plaintiff in the act of boarding it, having either one foot or both feet on the running board.

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On the other hand the testimony of one passenger who was called as a witness by the plaintiff and of seven other persons who were on or near the car and were called as witnesses on the part of the defendant tended to show that when the pole and sign fell the car was not stationary, but was going slowly around a curve at a street corner, where there was a cross walk. Of these seven the motorman testified that he did not see the plaintiff until after the fall of the pole and sign, and that the plaintiff was then standing on the cross walk within three or four feet of the car. The conductor testified that he saw nobody in the act of getting on. That he saw the plaintiff struck by the sign and that after being struck the plaintiff was from three to five feet from the car. Two others of the defendant's witnesses, policemen of Cambridge, testified that they were together standing on the street within a few feet of the plaintiff, who was standing on the cross walk as though waiting for the car to go by, and that he made no movement or attempt to get on the car. The other three witnesses for the defendant were passengers on the car and testified that they saw no one attempting to get on the car. Eight witnesses in all testified that the car was in motion around the curve when the accident occurred.

The defendant requested the judge to instruct the jury (1) that the plaintiff was not a passenger and that the defendant did not owe him the degree of care owed to passengers, and (2) that the defendant was required to exercise only that degree of care towards the plaintiff which a reasonably prudent person would exercise under the same circumstances. The judge instructed the jury in substance that a person desiring to ride upon a street car may have the rights of a passenger before he actually takes his place upon the car; that where he has signalled the motorman to stop and the motorman has stopped to receive him, thereby making an offer to be received and an acceptance of that offer, he is entitled to the rights and protection of a passenger as he approaches that car to get upon it, at least so far as any defect in that car is concerned.

After a verdict for the plaintiff the case is before us upon the defendant's exception to the refusal of the judge to give the rulings requested, and upon an exception to the portions of the charge which stated that a person may have the rights of a

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passenger as he approaches a street car and the degree of care owed to a person under those circumstances. The tenor of the parts of the charge so excepted to was as follows:

"Now, gentlemen, I want to say before I go into the evidence — to explain what I said I would explain about being a passenger. A man becomes a passenger, or at least it may be a more accurate way to say that he has the rights of a passenger, before he actually takes his place upon the car. He may do so. A man who comes to a steam railroad which has depots, when he has bought his ticket and as he is approaching the car, may have all the rights of a passenger, although he has not yet reached the car or taken his seat upon it. And the person desiring to ride upon the street car, where he has signalled the motorman to stop, and the motorman has stopped to receive him, thereby making an offer to be received and an acceptance of that offer — he is entitled to the rights and protection of a passenger as he approaches that car to get upon it; at least, so far as any defect in that car is concerned. He is within his rights and within the contract under those circumstances as he approaches that car, for instance, if anything falls, as in this case, from the car and strikes him."

"They owed him the duty to use the highest degree of care which is reasonably practical in running such a road; the utmost care which is consistent with the nature and extent of the business in which it is engaged, and such as a prudent man would use to guard them against every possible contingency — every possible danger, so far as it was practicable. They are not an insurer, but they owe a good deal more than the ordinary degree of care. A passenger entrusts his person, sometimes his life, to these companies, and is obliged to trust them for the precautions which shall be used for it; and the law has been long settled that he is entitled to call upon them, as I have said, for the highest practical degree of care in executing such an enterprise as running a street railway. That they must do for him, and the question is whether they failed in that duty, because in the failure of that duty is the plaintiff's case. If they performed that duty they owe no further liability to the plaintiff. He may have been injured by one of those inevitable accidents for which no remedy exists, and which we all have to bear as they come to us in the course of human life."

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It should be noted that in the charge the jury were instructed that the suit was not brought as in the right of a person upon the street; that the standards of care are quite different in the case of a passer-by upon a street struck by apparatus falling from a car, and that if the plaintiff had not become a passenger he could not recover. We assume that this portion of the charge was understood to mean, that, if the car had not stopped to receive the plaintiff, or, if he was attempting to go to it or to board it when it had stopped for some other purpose than to receive passengers and he had made to those in charge of the car no sign that he intended to take the car or had received from them in return no indication of assent to such a signal, or if he was attempting to reach or board the car while it was yet in motion, he could not recover.

This leaves as the turning point of the case the question whether a foot traveller on the highway who is approaching a street car stopped to receive him as a passenger, and before he actually has reached the car, is entitled to the rights of a passenger in respect of that extraordinary degree of care due to passengers from common carriers, at least so far as any defect in that car is concerned.

In other words the question is whether the jury should have been instructed that the defendant owed to the plaintiff the same high degree of care while he was approaching the car and had not yet reached it that it would owe to a passenger.

It is apparent that a person in such a situation is not in fact a passenger. He has not entered upon the premises of the carrier, as has a person who has gone upon the grounds of a steam railroad for the purpose of taking a train. He is upon a public highway where he has a clear right to be independently of his intention to become a passenger. He has as yet done nothing which enables the carrier to demand of him a fare, or in any way to control his actions. He is at liberty to advance or recede. He may change his mind and not become a passenger. Certainly the carrier owes him no other duty to keep the pavement smooth or the street clear of obstructions to his progress than it owes to all other travellers on the highway. It is under no obligation to see that he is not assaulted, or run into by vehicles or travellers, or not insulted or otherwise mistreated by other persons present.

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Nor do we think that as to such a person, who has not yet reached the car, there is any other duty as to the car itself than that which the carrier owes to all persons lawfully upon the street. There is no sound distinction as to the diligence due from the carrier between the case of a person who has just dismounted from a street car and that of one who is about to take the car but has not yet reached it. In the case of each the only logical test to determine the degree of care which the person is entitled to have exercised by the street railway company is whether the person actually is a passenger, or is a mere traveller on the highway. We think that a present intention of becoming a passenger as soon as he can reach the car neither makes the person who is approaching the car with that intention a passenger, nor changes as to him the degree of care to be exercised in respect of its cars as vehicles to be used upon a public way with due regard to the use of the same way by others.

The defendant incurs no responsibility to exercise extraordinary diligence by making an express contract, but only by its exercise of the calling of a common carrier, and its obligation as such does not arise until the intending passenger is within its control. We are unwilling to go farther than the doctrine stated in *Davey* v. *Greenfield & Turner's Falls Street Railway*, 177 Mass. 106, that when there has been an invitation on the part of the carrier by stopping for the reception of a passenger any person actually taking hold of the car and beginning to enter it is a passenger. See *Gordon* v. *West End Street Railway*, 175 Mass. 181, 183, and cases cited.

If the instructions allowed the jury to find for the plaintiff only in case the car had reached a usual stopping place and had stopped to receive him, there was error in ruling that under those circumstances and before he had actually reached the car he had a right to have the defendant exercise as to him that extraordinary degree of care due to passengers. So long as he remained a mere traveller on the highway, although walking upon it for the sole purpose of taking the car, the defendant did not owe him any other duty than that which it owed to any person on the highway. Whether one just has dismounted from a street car, or just is about to board one he does not have the rights of a passenger.

Exceptions sustained.

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AGNES C. FISH, executrix, *vs.* MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY.

Suffolk. January 18, 1904. — September 7, 1904.

Present: LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Insurance, Life. Contract, Construction.

A policy of life insurance payable to the wife and daughter of the insured, "or if they are not living to the executors, administrators or assigns" of the insured, is payable to the representative of the estate of the insured only on the contingency that both the wife and daughter are dead, and there is no implication that if one of the two is not living one half of the insurance money is payable to the executor or administrator of the insured, the wife and daughter of the insured both having vested interests in the policy before the death of the insured, whether their interests are joint with the incident of survivorship or in common, which in this case it was not necessary to decide.

CONTRACT by Agnes Cheney Fish, executrix under the will of Person C. Cheney, late of Manchester in the State of New Hampshire, for a balance alleged to be due under a policy insuring the life of Person C. Cheney in the sum of $3,000, made payable as stated in the first paragraph of the opinion, on which the defendant already had paid one half of the sum named in the policy. Writ dated June 18, 1903.

In the Superior Court the case was heard by *Gaskill*, J. on an agreed statement of facts. He found for the plaintiff in the sum of $1,695, and gave judgment for that amount. The defendant appealed.

W. W. McClench, for the defendant.

R. F. Herrick & A. B. White, for the plaintiff.

BARKER, J. Person C. Cheney in the year 1883 took out a policy of insurance upon his own life in the defendant company payable to "Sarah W. and Agnes A. Cheney wife and child of the said Person C. Cheney or if they are not living to the executors, administrators, or assigns of the said Person C. Cheney." Sarah W. the wife died on April 4, 1901, testate, and the plaintiff Agnes A. is executrix of her will and sole legatee under the same. The insured died on June 19, 1901, indebted to the defendant upon certain promissory notes unconnected with the con-

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tract of insurance. The defendant has paid the daughter one half the amount insured by the policy and has applied the other half to the reduction of the debt due to the company from the insured, upon the theory that the wife's half of the insurance, by her decease became, by the terms of the policy, payable at the death of the insured to his personal representatives, and so could be set off by the insurer against the debt due to it from the insured.

The case was heard below upon an agreed statement of facts and comes here after a judgment for the plaintiff and an appeal, and it is agreed that the plaintiff is entitled to recover unless the defendant has the right to set off its demand against the estate of the insured.

If by the true construction of the policy any part of the insurance was in fact payable to the executors or administrators of the insured in consequence of the death of his wife before his decease the defendant is entitled to the set-off.

In some jurisdictions a policy to the wife and child or children of the insured or to his children is held to give to the beneficiaries a joint interest with right of survivorship. *In re Seyton*, 34 Ch. D. 511. *Robinson* v. *Duvall*, 79 Ky. 83. *Farr* v. *Ancient Order of United Workmen*, 83 Wis. 446. The general intention of the insured to provide for his family by means of the insurance makes in favor of such a construction. But there also are decisions that under such a policy the right of each beneficiary is not joint, but an interest in common which becomes vested and transmissible upon the issuance of the policy. *Small* v. *Jose*, 86 Maine, 120. *Smith* v. *Ætna Ins. Co.* 68 N. H. 405. *Simmons* v. *Biggs*, 99 N. C. 236. *Andrus* v. *Fidelity Ins. Association*, 168 Mo. 151.

It is not necessary in the present case to decide whether the beneficiaries in such a policy take a joint interest with the incident of survivorship. The wife and child took vested interests whether several or joint. *Small* v. *Jose*, 86 Maine, 120. *Smith* v. *Ætna Ins. Co.* 68 N. H. 405. *United States Casualty Co.* v. *Kacer*, 169 Mo. 301, 315. *Walsh* v. *Mutual Ins. Co.* 133 N. Y. 408. If there had been no second designation of a beneficiary, the interest of the wife under R. L. c. 118, § 78, and the corresponding provisions of earlier statutes, would be in the daughter

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either by force of the will of Sarah W. Cheney or by operation of the statute. The crucial question is whether the interest which vested in Sarah W. upon the issuing of the policy was by its terms divested by her death. It is the whole amount of insurance which by the terms of the policy is to be payable to the executors, administrators or assigns of the insured, in a certain contingency, and not one half of it in each of two contingencies. The contingency is that "they" Sarah W. and Agnes A. are not living. That contingency has not occurred.

In neither the application nor the policy is it said in terms that if one of the two beneficiaries named in the first designation is not living one half of the insurance is to be payable to the executors or administrators of the insured. Such a term can be read into the contract only by some implication, and any such implication would be contrary to the intention of a husband and father, who was attempting by means of an insurance upon his own life to provide for his family in case of his death. In our opinion the second designation was intended to be operative only in case both the wife and the child were not living at the death of the insured.

The defendant relies on the case of *Andrus* v. *Fidelity Ins. Association*, 168 Mo. 151, 167. In that case the principal contention on the part of the defendant was that the insurance had been forfeited by breaches of the conditions of the policy, and the question as to which of the beneficiaries should take was not of the greatest importance. The decision contains no discussion of that question, saying upon the point merely that the beneficial interests of the mother and the son were several and that as they were several the interest of the mother passed at her death to the legal representative of the assured. It does not appear whether this was by force of some statute of distribution governing the estate of a deceased married woman, or under the terms of the policy. If the latter, we do not agree with the decision.

Judgment for the plaintiff affirmed.

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HARRIET E. PAGE *vs.* CITY OF MELROSE.

Middlesex. January 28, 1904. — September 7, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Practice, Civil, Findings of commissioner on appeal for abatement of taxes, Exceptions. *Tax*, Abatement.

The findings on matters of fact of a commissioner appointed under R. L. c. 12, § 80, on an appeal to the Superior Court for an abatement of taxes, are not open to revision by this court on exceptions.

Where in a case before this court on exceptions, the report of a commissioner appointed by the Superior Court on an appeal for an abatement of taxes reported the evidence, although the rule to the commissioner ordered him only "to hear the parties and report the facts to the court," and the Superior Court treated the evidence as before it upon the commissioner's report, this court considered the case as if the rule had required a report of the evidence as well as of the facts.

On an appeal to the Superior Court for an abatement of taxes the commissioner's report stated that no evidence was offered as to whether or not the assessors issued or published any notice to bring in returns under R. L. c. 12, §§ 41, 74, there was in evidence, produced by the respondent, a list of the petitioner's property on a blank in the usual form indorsed for filing as such and sworn to by the petitioner before one of the assessors on May 31 of the year in question, and it appeared that the assessors had abated a certain sum from the petitioner's tax as originally assessed. *Held*, that, taking into account the presumption that the assessors proceeded according to law in all their official doings, the evidence justified the commissioner in finding that the potitioner brought in a list of his real and personal estate as required by R. L. c. 12, § 41, seasonably filed within the requirement of § 74.

Under R. L. c. 12, § 78, an application to the assessors of a city or town for an abatement of taxes need not be in writing.

On an appeal to the Superior Court for an abatement of taxes, the facts, that a partial abatement was made by the assessors, that interest was charged upon the tax bill only from January 20, and that the assessors by a letter in February informed the petitioner that the board had voted to take no action toward reducing the assessed valuation of his estate, are evidence justifying a finding that the petitioner made a sufficient oral application for an abatement within six months from the date of his tax bill as required by R. L. c. 12, § 78.

BARKER, J. This appeal from the refusal of the assessors of the city of Melrose to abate a tax was committed by the Superior Court to a commissioner to hear the parties and report the facts to that court. At the hearing before the commissioner the respondent requested him to report the evidence. The report contains a statement of the evidence, followed by a statement

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of the facts found by the commissioner, concluding with a finding that the petitioner is entitled to an abatement of $60 with interest from March 16, 1903. The commissioner's report shows that at the hearing before him the respondent took eight exceptions to the exclusion or admission of evidence. The case was submitted to the Superior Court upon the report of the commissioner and the questions of law involved therein, and the respondent requested the judge to rule that the evidence reported by the commissioner did not warrant his findings and rulings, and that upon the evidence reported and the facts found by him so far as warranted by the evidence the petitioner was not entitled to maintain her petition. The judge declined to give either of the rulings requested and granted an abatement, and the cause is here upon a bill of exceptions to the action of the judge.

1. The exceptions to the admission and exclusion of evidence by the commissioner do not seem to have been relied on at the hearing in the Superior Court and have not been argued here. We do not consider or pass upon them.

2. It was held in *National Bank of Commerce* v. *New Bedford*, 175 Mass. 257, that the judgment in matters of fact of a commissioner appointed under St. 1890, c. 127, § 5, now R. L. c. 12, § 80, is not open to revision in this court on exceptions. Therefore the only questions now open are the questions of law whether upon the evidence reported the commissioner's findings were warranted, and whether upon the findings so far as warranted the petitioner was entitled to an abatement.

A preliminary question is raised by the petitioner, whether the report of evidence can be considered here. The statute provides for a report of the facts "with or without the evidence." The rule to the commissioner ordered him "to hear the parties and report the facts to the court", and did not order him to report the evidence. We infer from the bill of exceptions that the court below treated the evidence as before it upon the commissioner's report. As that court could have recommitted the cause for a report of the evidence if it had seen fit, we have examined the case as if the rule had required a report of the evidence as well as of the facts.

The particulars in which the respondent contends that the find-

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ings of the commissioner were not warranted by the evidence are that it does not appear that the petitioner filed her list seasonably, and that the evidence does not prove that she made a sufficient application to the assessors for an abatement.

The tax in respect of which the abatement was sought was one assessed on real estate as of May 1, 1902. It was incumbent on the petitioner to show that she seasonably filed a list of her property as required by statute. R. L. c. 12, §§ 41, 74. The report states that no evidence was offered as to whether or not the assessors issued or published any notice pursuant to R. L. c. 12, § 41. A list of the petitioner's property as of the year 1902, upon a blank in the usual form, indorsed for filing "Statement for the Taxable Year 1902 of Harriet E. Page", the petitioner, and sworn to by her on May 31, 1902, before one of the assessors, was in evidence, produced by the respondent. Besides this it appeared that the assessors had abated the sum of $22.36 from the petitioner's tax as originally assessed. Taking into account the presumption that the assessors proceeded according to law in all their official doings, we are of opinion that the evidence justified the commissioner in finding that the petitioner duly brought in to the assessors a list of her real and personal estate as required by R. L. c. 12, § 41.

The principal contention that no sufficient application to the assessors for an abatement was shown is founded upon the contention that such applications must be in writing. The statutory provisions for abatement by the assessors are found in R. L. c. 12, §§ 73–76. The initial provision is that "A person aggrieved by the taxes assessed upon him may . . . apply to the assessors for an abatement thereof." There is no explicit requirement that the application shall be in writing. By § 74 if the applicant seeks an abatement of a tax upon real estate and has not included real estate in his list of taxable property brought in to the assessors under § 41 "he shall . . . file with his application a list . . . of his real estate." The words "with his application", so far as we are informed, have been commonly considered to mean "at the time of making his application", and have not been thought to carry any implication that the application itself must be in writing or be filed. The usual course of proceedings upon applications to assessors for abatement is entirely

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informal. It would be we think a great surprise to the community to hold that an oral application for abatement was not legal and sufficient. We find support for this view in the specific requirement of R. L. c. 12, § 76, that the notice of the assessors' decision upon an application for abatement shall be written. This seems to imply that the previous proceedings may have been oral.

The respondent also contends that if an oral application was sufficient there was no sufficient evidence that one was made. The weight of the evidence was for the commissioner. The partial abatement made by the assessors, the fact that interest was charged upon the tax bill only from January 20, 1903, and the letter of February 18, 1903, communicating to the petitioner's agent the fact that the board of assessors had voted to take no action toward reducing the assessed valuation of her estate, were pregnant circumstances justifying the finding that the assessors were in fact applied to for an abatement within six months from the date of the tax bill.

The final contention of the respondent is that the appeal to the Superior Court was not seasonably entered. It was entered on April 6, 1903. Such appeals must be entered on the first return day after the expiration of thirty days from the giving of the written notice of the decision of the assessors. R. L. c. 12, § 78. If the written notice of their decision was the letter of February 18, 1903, the appeal was seasonably entered. Whether that letter was the written notice by the giving of which the time of entering the appeal was to be determined was a question of fact for the commissioner.

There was a request made to the commissioner for a ruling that on all the evidence the petitioner was not entitled to an abatement. So far as the exception to the refusal of this request involves the weighing of the evidence, or the drawing of inferences therefrom, the judgment of the commissioner cannot be revised here upon exception. *National Bank of Commerce* v. *New Bedford*, *ubi supra*. So far as the request involves questions of law they have been discussed already.

Exceptions overruled; judgment affirmed.

G. L. Mayberry, (*F. L. Washburn* with him,) for the respondent.

F. S. Hesseltine, for the petitioner.

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JAMES DREW (substituted by amendment) *vs.* RICHARD M. FARNSWORTH.

Suffolk. January 29, 1904. — September 7, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Practice, Civil, Amendment. *Negligence,* In driving. *Pleading, Civil,* Variance.

An amendment inserting in a writ the name of a minor as plaintiff instead of that of his next friend, filed on the day the writ was entered but not acted on by the presiding judge, although read to the jury by the plaintiff as part of the pleadings, can be allowed by the judge after a verdict for the plaintiff, when first called to his attention by the defendant on a motion for a new trial.

One driving a two horse furniture team at the rate of five or six miles an hour in an empty street, so near a sidewalk that the hub of the wheel extending over the sidewalk hits a boy standing about a foot and a half inside of the curbstone in a place of apparent safety, can be found to be negligent, and his master to be liable to the boy for injuries thus caused if the boy is in the exercise of due care.

A declaration, alleging that the plaintiff was injured when "crossing the junction" of two streets named, may be supported by evidence that the plaintiff was injured when he had been standing for two or three seconds on the sidewalk at the corner of the two streets looking across one of them.

TORT, by Catherine Drew for the benefit of her minor son James Drew, as stated in the first two paragraphs of the opinion, for injuries to James from being run over and injured by a two horse furniture team of the defendant at the corner of Short Street and Medford Street in that part of Boston called Charlestown, through the alleged negligence of the driver of the team, the alleged servant of the defendant. Writ dated January 12, 1899.

In the Superior Court the case was tried before *Wait*, J., who refused to make certain rulings requested by the defendant, and submitted the case to the jury. The jury returned a verdict for the plaintiff in the sum of $800; and the defendant alleged exceptions. The judge also denied a motion of the defendant for a new trial, allowing the amendment stated in the opinion of the court in the manner there described. The defendant alleged exceptions to the allowance of the amendment and the denial of the motion for a new trial.

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O. Storer, for the defendant.

J. J. Corbett, M. L. Jennings & S. A. Jennings, for the plaintiff, submitted a brief.

BARKER, J. The case is here upon exceptions taken at the jury trial and also upon an exception to the disallowance of the defendant's motion for a new trial. The writ was in tort, and the plaintiff was designated in it as "Catherine Drew of . . . Boston." When served it contained no declaration. When the writ was entered a declaration was filed which alleges that "the plaintiff, a minor, who brings this action by his next friend says that . . . the defendant was owner of a team . . . driven by the servant of the defendant" and that the plaintiff was "crossing the junction of" two streets named and using due care and that the defendant by his servant so negligently drove the team that the plaintiff was knocked down and run over and greatly injured.

The writ was entered and the declaration filed on February 6, 1899. On the same day a motion was filed to amend the writ by inserting after the words "Catherine Drew of said Boston" the words "who brings this action for and as the mother and next friend of James Drew a minor." The defendant answered with a general denial on March 2, 1899. The jury trial took place on May 6, 1903.

The defendant's motion for a new trial was filed within three days after the verdict, and was heard on May 16, 1903. In support of that motion he contended that since there was no evidence of any damage except suffering on the part of the minor, the plaintiff could not recover, the plaintiff named in the writ being Catherine Drew. No mention of any such question was raised at the trial, and the pleadings including the amendment were read in the opening as though the amendment had been allowed, and the motion for amendment was not called to the attention of the judge by the defendant's counsel until the time set for hearing his motion for a new trial. The judge thereupon allowed the amendment as of May 6, 1903, and disallowed the motion for a new trial. The power to allow amendments at any time before final judgment is ample. R. L. c. 173, § 48. It well may be exercised when some error has been made in a writ bringing a suit for a minor. See *Smith* v. *Carney*, 127 Mass. 179, 181, and cases cited. So, when there is no good reason for

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a new trial, the power may be exercised after verdict and judgment ordered in accordance with the verdict. *Pierce* v. *Charter Oak Ins. Co.* 138 Mass. 151, 164. *Wright* v. *Vermont Ins. Co.* 164 Mass. 302, 305.

The exceptions taken at the jury trial were to the refusal to give certain rulings. The defendant's brief makes three contentions. (1) That the evidence failed to justify a finding of negligence on his part, (2) That the evidence showed negligence on the part of the minor and (3) That there was a variance, the allegation of the declaration being that the minor was "crossing the junction of" certain streets while the evidence showed that he was standing on the sidewalk.

The evidence consisted of the testimony of the minor and of a foot traveller on one of the streets, and of a written statement that the defendant's servant if present would give certain testimony. The two streets which met were named Short and Medford.

The testimony of the minor tended to show that he lived on Short Street and that he came down Short Street to the corner of Medford Street to look for boys, and that he had been standing for two or three seconds when the defendant's team drove along Medford Street coming from a direction in the rear of the minor as he was standing looking directly across Short Street; that the team was near the sidewalk and moving at a rate of five or six miles an hour, and that the hub of the wheel hit him in the left side and threw him down and the wagon ran over his leg; that he was standing about a foot and a half from the curb; that he saw no one and did not see or hear any team until the wheel hit him and heard no sound except that of a locomotive.

The testimony of the other witness tended to show that he lived on Medford Street, and was walking along that street toward Short Street when the team passed him; that he saw the minor standing on the edge of the sidewalk; that the team was driving on a trot close to the sidewalk, and so close that when the forward wheel came to a cesspool depression it threw the wagon so that the hub of the forward wheel struck the boy and threw him down, and the wheel ran over him.

The statement as to the testimony which the defendant's driver would give if present was that he had stopped the team

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near the corner and thrown down the reins preparatory to alighting, when two boys playing tag came running very fast around the corner, — that one of the boys ran into the horses and caused them to start and the other boy ran into the wagon and slipped or fell down and was run over.

A summons to appear and testify had been left at the home of the driver, but no personal service had been made. The defendant's counsel argued to the jury that the driver was kept away from the trial by the plaintiff, while the plaintiff's counsel argued that the servant was trying to avoid being a witness.

We are of opinion that the questions of the negligence of the driver and of the care of the minor were for the jury, as also the question whether the driver was the defendant's servant. There was no contention that there were other vehicles in the street, or that it was necessary for the driver so to manage his wagon that the wheel would strike a person on the sidewalk. The minor seems to have been in a place of apparent safety and, if standing as he testified, could be found to have been in the exercise of ordinary care.

As to the contention that there was a variance because for two or three seconds the minor was standing at the corner, while the declaration alleged that he was "crossing the junction", it is to be noticed that the bill of exceptions does not show that this contention was made either at the jury trial or at the hearing of the motion for a new trial. If necessary such a variance could be remedied now by an amendment. See *Pierce* v. *Charter Oak Ins. Co.* and *Wright* v. *Vermont Ins. Co.*, *ubi supra*. But this is not necessary. The jury could find that the point where the minor was when struck was within the junction of the two streets, and that he was crossing the junction although for two or three seconds he had stopped to look across.

Exceptions overruled.

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SADIE McCOY *vs.* ANNA L. WALSH.

Suffolk. March 9, 1904. — September 7, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

License. Landlord and Tenant. Agency. Evidence, Admissions.

If a woman owning a tenement house with a shed, the roof of which is flat with a railing around it and is used by the tenants, also owns an adjoining shed with a pitched roof having a skylight but no railing, and tells the tenants not to allow their children in the street, and that if they want air the roofs are there for them, and says that the mother of certain children has nothing else to do but to sit on the roofs and mind them, and if this can be construed as an invitation to any one to allow children to go on the roofs unattended, it amounts to no more than a license, and the house owner making the statements is not liable to a child six and a half years old, an inmate of the tenement house, injured by falling through the skylight of the pitched roof of the adjoining shed when going over to see if a little boy is coming out to play with her.

In an action by a child for injuries from falling through a skylight in the roof of a shed belonging to the defendant, adjoining the roof of a shed of a tenement house belonging to the defendant of which the plaintiff is an inmate, if it appears that the plaintiff lives with her mother in a room of the tenement house hired from a Mrs. K. who has leased the whole house from the defendant, this does not make Mrs. K. the custodian of the roof of the shed of the defendant through the skylight of which the plaintiff has fallen, and conversations of a witness with Mrs. K. tending to show where children were allowed to play are not admissible against the defendant.

LATHROP, J. This is an action of tort for personal injuries sustained by the plaintiff, a girl six and a half years old, by falling through a skylight in the roof of a shed in the rear of 105 Kneeland Street, in Boston. At the trial in the Superior Court, the judge directed a verdict for the defendant, and the case is before us on the plaintiff's exceptions.

The plaintiff lived with her mother at 45 Albany Street, in a single room in the attic, which was hired of a Mrs. Kent who leased the entire building from the defendant. In the rear of this building was a shed, with a flat roof, which was used by the tenants of the building for hanging out clothes. In the rear of this shed was another shed with a pitched roof which belonged to 105 Kneeland Street, which was also owned by the defendant. The roof of the shed in the rear of 105 Kneeland Street was one foot higher than the other roof. There was a

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railing around the roof in the rear of 45 Albany Street but none around the pitched roof. In the latter roof was the skylight in question raised about three inches above the roof and covered with boards, one of which was new, the others being old and somewhat decayed. After the accident the centre board was found broken.

The mother of the plaintiff had been on the flat roof with the plaintiff and two younger children all day and towards evening when it was almost dark she was taking the children upstairs, when Mrs. Kent asked the mother of the plaintiff to let the plaintiff stay down a little while. Mrs. Kent then told the plaintiff to go and play with a little boy who lived at 105 Kneeland Street. The plaintiff testified that she went over to play with the little boy; that his mother called him to supper, and the plaintiff went over to see if the little boy was coming out, and she fell through. She also testified that she had played with the little boy every day on her shed, but had never before been on the other shed where she fell through.

The principal question in the case is whether there was evidence sufficient to warrant the jury in finding that the defendant invited the children to use her roof, or whether so far as they used her roof they were mere licensees, and took the roof as they found it.

The only witness called on this point was Mrs. McCoy, who testified that she was sitting on the stairs with her baby, when the defendant said to Mrs. Kent: "Take that woman and her baby off the stairs because she won't sit there, and take those children off the street, and the roofs is there for them for to get air, because while they live in my house they won't be in the street, neither will that woman be with her baby sitting on the stairs." The witness further testified that she then came down and stood at the front room, where Mrs. Kent and Mrs. Walsh were, and Mrs. Walsh said: "I have just given my orders to Mrs. Kent that you will not have your children in the street while they live in my house, and you can't sit on the stairs either, nor Mrs. Kent either. If you want air the roofs are there for you." Farther on the witness testified that Mrs. Walsh said to Mrs. Kent: "She must not allow the children in the street, nor me and my baby on the stairs; that the mother had nothing else to do but sit on the roofs and mind them."

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If it is possible to construe this as an invitation, it seems to us that both parties must have understood from the language used that when the children went on the roof the mother was to be there to guard them, and that there was no invitation to any one to allow the children to go there alone.

However this may be, we are of opinion that what was said amounted to no more than a license, and that the plaintiff took the premises as she found them. *Plummer* v. *Dill*, 156 Mass. 426.

The remaining exception relates to the exclusion of evidence. After the testimony of Mrs. McCoy in regard to her conversation with Mrs. Walsh and Mrs. Kent had been given, Mrs. McCoy was asked: "Did you ever have any conversation with Mrs. Kent after that in regard to where the children should be kept?" This question was excluded. The plaintiff's counsel stated that he asked the question on the theory that Mrs. Kent was acting as Mrs. Walsh's custodian of the property. We see no ground of exception.

There was no evidence that Mrs. Kent was acting as custodian of the property of Mrs. Walsh, and what Mrs. Kent said could not bind the defendant.

Exceptions overruled.

R. D. Ware, for the plaintiff.

S. H. Tyng, for the defendant.

ELIZABETH LINDSAY *vs.* ARLINGTON CO-OPERATIVE ASSOCIATION.

Essex. June 22, 1904. — September 7, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Co-operative Association. Corporation, By-laws.

A purchase of shares in a co-operative association incorporated under Pub. Sts. c. 106, is in effect a loan upon interest. A shareholder may withdraw his money under the terms of a by-law of the corporation giving him the right of withdrawal on notice, and if the corporation refuses to return the money he can maintain an action for it.

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A by-law of a co-operative association incorporated under Pub. Sts. c. 106, contained the following provision: "Any member of this association desiring to withdraw from the association the whole or any part of his or her stock shall make a written application to the directors, and within thirty days from the date of such application the board shall pay or cause to be paid such applicant the amount of shares he may desire to withdraw, but if the board fail to pay or cause the same to be paid within thirty days, said applicant may transfer his or her shares to any other member." *Held*, that by its true construction this by-law required the association to pay to a withdrawing stockholder the par value of his shares, and so construed was valid.

CONTRACT by a stockholder in the Arlington Co-operative Association, against that corporation, for the par value of twenty-eight shares of its stock which the plaintiff had given notice that she desired to withdraw under the terms of a certain by-law of the defendant. Writ in the Police Court in Lawrence, dated October 21, 1903.

On appeal to the Superior Court the case was heard by *Holmes*, J., without a jury, on an agreed statement of facts. He gave judgment for the plaintiff in the sum of $143.36; and the defendant appealed.

By the agreed facts it appeared that the plaintiff was the owner of thirty shares of the capital stock of the defendant of the par value of $5 each, and had on deposit with the defendant the sum of $4.48, which was part payment toward another share of stock under the provisions of the by-laws; that the plaintiff on September 12, 1903, gave the defendant notice in writing that she desired to withdraw all of her stock but two shares, under the provisions of section 1 of article 10 of the by-laws, and that the defendant refused to purchase the twenty-eight shares of stock offered for withdrawal; that the stock of the defendant corporation had no market value, and that the par value of the plaintiff's shares of stock was $150.

The provision of the defendant's by-laws above mentioned under which the action was brought was as follows:

"Article X. Sect. 1. Any member of this association desiring to withdraw from the association the whole or any part of his or her stock shall make a written application to the directors, and within thirty days from the date of such application the board shall pay or cause to be paid such applicant the amount of shares he may desire to withdraw, but if the board fail to pay or cause the same to be paid within thirty days, said applicant may trans-

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fer his or her shares to any other member, provided the member has not the full number of shares allowed in the by-laws, but in no case shall he transfer his share to persons not members of the association unless he first obtain consent of the board of directors, which consent shall be signed by the president and clerk and entered on the records of the association. In case a member transfer his share or shares he must surrender his certificate to the board of directors, and the board shall cause a new certificate to be issued to the person to whom he makes such transfer."

W. S. Knox & W. Coulson, for the defendant.

R. H. Sherman & W. C. Ford, for the plaintiff.

BARKER, J. The defendant was incorporated on July 8, 1884, under the provisions of Pub. Sts. c. 106, to carry on the trade of general dealers in household supplies on the co-operative plan. The statute provided that the capital of any such association should not be less than $1,000 nor more than $100,000. Pub. Sts. c. 106, § 9. The amount of the defendant's capital was not fixed by its by-laws, and is not stated in the agreed facts.

There are but scanty statutory provisions regulating co-operative trading associations. The par value of their shares may be $100 or any sum fixed in the articles of association, and may be changed by vote of the stockholders. Pub. Sts. c. 106, § 31. When they increase capital stock the new shares may be sold or issued in such manner as the stockholders may by vote direct, but for not less than par. Pub. Sts. c. 106, § 88. The distribution of profits or earnings is regulated. No stockholder has more than one vote, or can hold more than $1,000 worth of shares at their par value. Until a contingent or sinking fund equal to thirty per cent in excess of the capital stock has accumulated no distribution of profits or earnings shall be made until at least ten per cent of the net profits has been appropriated to such a fund. Pub. Sts. c. 106, §§ 72, 73.

Co-operative associations have long been in use in Massachusetts. One usual feature has been the allowance to stockholders of an annual interest upon the par value of their shares rather than a dividend of profits as such. As the associations are formed for the mutual benefit of persons who, more or less closely, are neighbors, and whose greatest interest in them is

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the opportunity to purchase supplies of good quality at a low price or to dispose to advantage of farming products or the like, rather than to have a fixed investment of interest yielding capital, another usual feature has been an arrangement by which any member when it becomes for his interest so to do may withdraw his capital. Such provisions have been brought before this court in cases not unlike the present, and have been held to constitute agreements between the stockholder and the corporation under which the latter has a right to demand back the money he has paid to the corporation, and to maintain an action for it in case the corporation refuses to pay. See *Fuller* v. *Salem & Danvers Loan & Fund Association*, 10 Gray, 94; *Merrill* v. *McIntire*, 13 Gray, 157; *Baxter* v. *McIntire*, 13 Gray, 168; *Delano* v. *Wild*, 6 Allen, 1; *Hartford* v. *Coöperative Mutual Homestead Co.* 128 Mass. 494; *Atwood* v. *Dumas*, 149 Mass. 167.

The power of a corporation to purchase shares in its own capital stock is settled, as also is its power to agree with a stockholder that his shares shall be transferred to the corporation under certain circumstances. *New England Trust Co.* v. *Abbott*, 162 Mass. 148, 152. *Dupee* v. *Boston Water Power Co.* 114 Mass. 37. See *Jones* v. *Brown*, 171 Mass. 318; *Whiton* v. *Batchelder & Lincoln Co.* 179 Mass. 169. Considering that such a course of dealing on the part of co-operative companies and their members with reference to the withdrawal of a member's interest in the capital has been usual from a time earlier than that when their incorporation was provided for by statute, we are of opinion that such arrangements between a co-operative corporation and its members are legal.

We also are of opinion that in the present instance the tenth article of the by-laws, entitled "Withdrawals", should be construed as a positive agreement of the defendant with each of its members, that any member desiring to withdraw from the association the whole or any part of his stock, who makes to the directors a written application to that effect, is entitled to be paid by the association an amount of money equal to the par value of the shares he may desire to withdraw. Such is the clear import of the language of the first part of the article. The subsequent clauses provide for other privileges, but do not indicate that the intention was merely to give to the association

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an option to take the shares, and to the member merely a possible means of disposing of them to other members or to persons not members in case the association should not pay the amount of the shares to the member desiring to withdraw them from the association. The ownership of a single share entitles the member to the same dividend on the amount of his purchases of goods, as if he owned the largest permissible number of shares. Upon his shares as such the member is not entitled to dividends, but to interest at a fixed low rate payable quarterly. The shares in effect are advances or loans upon interest, made by the members to the association, subject to call in the manner provided by the article of the by-laws regulating the withdrawal of shares. The system assumes that the undertaking will be prosperous, and so long as it is so there will be little practical difficulty caused by withdrawals. The fact that if the business is conducted at a loss the members who withdraw first may get back their money and others not, is an incident to which each member exposes himself by taking shares, and which the Legislature has not deemed it best to provide against in its statutory regulations.

The defendant cites certain cases from other jurisdictions holding similar by-laws invalid. In *Driscoll* v. *Lewiston Equitable Co-operative Society*, 59 Maine, 474, the by-law purported to give the right only when the assets of the society should be in excess of its liabilities, and the company was insolvent when the notice of withdrawal was given. Besides this there seems to have been a statutory provision that no such corporation was allowed to divide any of its corporate property so as to reduce its stock below its par value until all debts were paid, and then for the purpose of closing its concerns. In *Vercoutere* v. *Golden State Land Co.* 116 Cal. 410, the company was held to have been incorporated under other sections of the code than those contended for by the plaintiff, and it was held that the company was forbidden to withdraw any portion of its capital stock except upon its dissolution, and therefore that the by-laws providing for a surrender of stock on sixty days' notice were invalid.

The view which we take of the construction and validity of the by-law makes it unnecessary to consider the contention that

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there could be no damage because the stock had no market value. The agreement was not to buy the stock as a commodity, but to repay to the member desiring to withdraw his shares the amount of such shares at par. The measure of damages for the breach of such an agreement to pay a definite sum of money is the amount due and unpaid with interest from the time that it was payable. See *Fuller* v. *Salem & Danvers Loan & Fund Association*, *Atwood* v. *Dumas*, *ubi supra*.

Judgment for the plaintiff affirmed.

COMMONWEALTH *vs.* SOLOMON ANSELVICH.

Suffolk. June 22, 1904. — September 7, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Constitutional Law, Class legislation, Unconstitutionality of part of statute. *Trademark*, Unlawful use and sale of registered bottles. *Bottles*. *Practice, Criminal*, Motion to quash. *Statute*, Repeal. *Evidence*, Admissions and confessions.

R. L. c. 72, § 16, imposing a penalty of fine or imprisonment for the use and sale of registered bottles without the written consent of the person whose name is on the bottles unless purchased from him, is not unconstitutional as class legislation or otherwise.

The constitutionality of R. L. c. 72, § 18, authorizing the issuing of search warrants in case of the unlawful use and sale of registered bottles was not passed upon in this case, but it was *held*, that, if that section is unconstitutional, its unconstitutionality does not affect the validity of § 16 of the same chapter imposing a penalty of fine or imprisonment for the unauthorized use and sale of registered bottles.

Under R. L. c. 219, § 21, a motion to quash a complaint for defects of form cannot be made for the first time in the Superior Court in a case which has come to that court by appeal from a municipal court.

By R. L. c. 226, § 2, a statute repealed by R. L. c. 227, but embodied in substance in a provision contained in a preceding chapter of the Revised Laws, is construed as continued in force and not as repealed and re-enacted.

Under R. L. c. 226, §§ 4, 5, 6, in regard to the effect of a repeal of a law by the Revised Laws, the filing and publication of the description of a name used as a trademark on registered bottles, if made under St. 1893, c. 440, § 1, is good under R. L. c. 72, § 15, embodying the same provision in substance, although St. 1893, c. 440, is enumerated among the laws repealed by R. L. c. 227.

On the trial of a criminal complaint in the Superior Court on appeal from a municipal court, the jury may be told that they may consider the fact that one branch of the defence introduced in the Superior Court was not presented at the trial

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in the court below, if they also are told that the defendant might have refrained on the ground of policy from putting in his defence or a part of it in the lower court, and that if he did so no inference can be drawn against him from his failure to put it in, and that unless the jury are satisfied that the defendant had the evidence in his possession at the time and would have put it in at the trial in the lower court if it had been true, no inference should be drawn against him for his failure to introduce it there.

COMPLAINT, received and sworn to in the Municipal Court of the Roxbury District of the City of Boston on October 29, 1902, under R. L. c. 72, § 16, charging the defendant with the illegal use and sale of certain registered bottles as stated in the first paragraph of the opinion.

The defendant, having been found guilty, appealed to the Superior Court, where he was tried before *Bond*, J. The defendant filed in that court a motion to quash the complaint which was denied by the judge. The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. W. Corcoran, *W. B. Sullivan & C. W. Ford*, for the defendant.

J. D. McLaughlin, Second Assistant District Attorney, for the Commonwealth.

KNOWLTON, C. J. This is a complaint under the R. L. c. 72, § 16, charging the defendant with having sold, bought, given, taken, or otherwise disposed of or trafficked in certain bottles, marked and distinguished with the name of L. Speidel and Company, as set forth in the complaint, together with the word "Registered," the description of which name, mark and device had previously been duly and legally filed and published. The principal contention of the defendant is that the statute under which the complaint was made is unconstitutional.

This statute appears to have three objects, of which one is to protect the public from fraud and deception by preventing the unauthorized use, a second time, of vessels or receptacles originally marked in such a way as to indicate their contents together with the source from which they came; another is to protect the manufacturer or dealer from loss of profits or reputation by the unauthorized use of his property to deceive the public by a sale of an inferior article in such a manner as to indicate that it was manufactured or put up by him; and the third is to aid the manufacturer or dealer in protecting and preserving a kind of prop-

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erty, which, from its nature and use, is peculiarly liable to be misappropriated by careless or dishonest persons. These are proper objects of legislation, which have been recognized in our statutes for many years. Sts. 1850, c. 90, §§ 1, 2; 1852, c. 197; 1853, c. 156, § 1; 1870, c. 340. Rev. Sts. c. 28, § 132. Gen. Sts. c. 49, § 117; c. 56, § 3; c. 161, §§ 55, 56. Pub. Sts. c. 76, §§ 3, 4, 5, 6; c. 203, §§ 63, 64. R. L. c. 72, §§ 2, 3, 5, 10, 12. Unless this statute violates the Constitution in the nature of its provisions, or in the methods which it prescribes to accomplish the objects of the Legislature, it must be sustained. We see nothing in it that transcends the power of the Legislature in these particulars. The means provided are reasonably adapted to the ends in view. The statute does not apply to any case in which there has been a purchase from the owner of the registered receptacle, and it properly forbids the defacement, or use, or sale of the receptacle without the written consent of the owner, in all cases in which there has been no purchase by any one from him.

The defendant contends that the statute improperly gives advantages to certain classes of persons, which others do not have. In this he is mistaken. It makes provisions in reference to a kind of property, used in a peculiar way, which is of such a nature as to call for peculiar provisions for the protection of the public and of its owners against the fraud of evil doers. So too the provision making possession by an agent or dealer, without the written consent of or purchase from the owner, *prima facie* evidence of a violation of the statute, is not class legislation. The peculiar conditions referred to in this part of the statute have such a probable connection with the commission of the offence, that the Legislature well may legislate in reference to them. It is not persons who are particularly dealt with in the statute, but the conditions which pertain to their occupation and business. It is in the power of the Legislature to make certain conditions *prima facie* evidence of the commission of a crime, and this is a common kind of legislation. *Commonwealth* v. *Williams*, 6 Gray, 1. *Holmes* v. *Hunt*, 122 Mass. 505, 518. *Commonwealth* v. *Hall*, 128 Mass. 410. *Commonwealth* v. *Barber*, 143 Mass. 560. *Commonwealth* v. *Intoxicating Liquors*, 172 Mass. 311. It cannot be said that the conditions referred to in

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this statute are so foreign to probable guilt as to furnish no justification for the legislative enactment that they shall be deemed *prima facie* evidence of guilt.

Statutes having some of the features of this act as to the protection of trademarks have been upheld by this court. *Commonwealth* v. *Rozen*, 176 Mass. 129. *Tracy* v. *Banker*, 170 Mass. 266. *Gilman* v. *Hunnewell*, 122 Mass. 139. *Lawrence Manuf. Co.* v. *Lowell Hosiery Mills*, 129 Mass. 325.

The case of *People* v. *Cannon*, 139 N. Y. 32, arose under a statute whose language is almost identical with the language of this, as found in the original enactment in the St. 1893, c. 440, and the court, in an elaborate opinion, unanimously held the law to be constitutional. Decisions in *Gillespie* v. *People*, 188 Ill. 176, and *Horwich* v. *Walker-Gordon Laboratory Co.* 205 Ill. 497, declaring similar statutes unconstitutional, are not in harmony with the cases in this Commonwealth. We are clearly of opinion that the parts of the statute involved in this case are constitutional. Without intimating that there is any ground for a different conclusion in regard to § 18 of the chapter (see *Commonwealth* v. *Intoxicating Liquors*, 172 Mass. 311) it is enough to say as to this part of the statute, that it is not involved in the present case, and that it is not so far essential to the other parts of the act that its unconstitutionality, if it were unconstitutional, would affect their validity. *Commonwealth* v. *Petranich*, 183 Mass. 217. *Edwards* v. *Bruorton*, 184 Mass. 529.

The second part of the motion to quash, which relates to matters of form, not having been made in the lower court, comes too late and need not be considered. R. L. c. 219, § 21. *Commonwealth* v. *Reid*, 175 Mass. 325.

The defendant objected to evidence of the filing and publication of the description of the name used by L. Speidel and Company, because it was done about January 17, 1900, before the enactment of the Revised Laws under which the complaint was made. The answer to this objection is that the filing and publication were done pursuant to the St. 1893, c. 440, § 1, which was repealed by the R. L. c. 227, but was embodied in substance in the R. L. c. 72, § 15. It is provided by the R. L. c. 226, § 2, that "The provisions of the Revised Laws, so far as they are the same as those of existing statutes, shall be construed as a con-

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tinuation thereof and not as new enactments." So also, § 4 of this chapter provides that the repeal of a law by the chapter "shall not affect any act done, ratified or confirmed, or any right accrued or established . . . before the repeal takes effect," etc. See also R. L. c. 226, §§ 5, 6. The evidence was rightly admitted.

The defendant also objects to that part of the charge in which the judge instructed the jury that they might consider the fact that one branch of the defence introduced at this trial was not presented at the trial in the lower court. This instruction was carefully guarded. The jury were shown that a party might, on grounds of policy, refrain from putting in his defence, or a part of his defence, in the lower court, and that in such a case no inference could be drawn against him from his failure to put it in. They were told that unless they were satisfied that the defendant had the evidence in his possession at the time, and would have put it in at the trial in the lower court if it had been true, no inference should be drawn against him from his failure to introduce it there. There was no error in the instruction. *Commonwealth* v. *Goldstein*, 180 Mass. 374.

Exceptions overruled.

HAGOP BOGIGIAN *vs.* MEHMET HASSANOFF.

Suffolk. December 17, 1903. — September 8, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Frauds, Statute of, Sale of goods, wares or merchandise. *Mortgage*, Of chattels. *Practice, Civil*, Master's report.

A contract between one who has advanced money, taking as security a storage receipt for certain goods and later a bill of sale of the goods, and the owner of the goods, by which it is agreed that the goods shall be sold by the combined efforts of the parties, on the terms and conditions agreed upon, and the proceeds applied to reimbursing and compensating the lender of the money, the balance to go to the owner of the goods, is not a contract for the sale of goods, wares or merchandise within the meaning of the statute of frauds.

Whether a mortgage of personal property is a contract for the sale of goods, wares or merchandise within the meaning of the statute of frauds, *quære*.

Where a master's report does not state the evidence the correctness of his findings on matters of fact cannot be considered.

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MORTON, J. This was originally an action at law brought by trustee process in the municipal court of Boston. It was changed into a bill in equity by an interlocutory decree of the Superior Court, from which no appeal was taken and in regard to which no question appears to have been raised. The plaintiff seeks to recover a certain sum of money alleged to have been advanced by him to and for the defendant for which he holds as security a storage receipt for certain goods belonging to the defendant in storage at Long Wharf in Boston, and also damages for the breach of a contract entered into between the plaintiff and the defendant in regard to the sale of the same, or the same and other goods in storage at Long Wharf, and the redemption and sale of goods in London all belonging to the defendant, and the advancement of money by the plaintiff for the purpose of paying the duties and storage charges on the goods and for other purposes, and the rendering of services by the plaintiff in connection with the sale of the goods. The defendant set up amongst other defences that the alleged agreement was within the statute of frauds. The case was sent to a master who found that the plaintiff had lent the defendant the sums alleged and had received, as security therefor, the warehouse receipt of the defendant's goods and that later, as a part of the agreement between the parties a bill of sale of the goods on storage at Long Wharf was executed by the defendant to the plaintiff. The master also found that an oral agreement, which was reduced to writing but not signed, was entered into between the parties, and that a copy of this agreement was duly set out as a part of the defendant's answer. He ruled that the agreement constituted a mortgage of personal property and was not within the statute of frauds, and reported in favor of the plaintiff. Upon the coming in of the master's report the defendant filed objections and exceptions thereto, and, it appearing that the master had not found as a fact that the plaintiff had made any effort or offer to advance the money as agreed, or that performance on his part had been obstructed or prevented by the defendant, the report was recommitted to him "to report the facts concerning the breach of the alleged agreement." The defendant filed objections and exceptions to the supplemental report. The exceptions to both reports were overruled, except that relating to the assessment of damages, which was

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sustained so far as to reduce the damages from $720, as found by the master, to $450, and a decree was entered in favor of the plaintiff. The defendant appealed. The exceptions relied on are the first, second and third to the first report, and those to the supplemental report.

The exceptions to the first report raise the question, set up in the answer, namely, whether the alleged agreement is within the statute of frauds. We think it is plain that it is not. The transaction was not a sale of goods by the defendant to the plaintiff, conditional or otherwise, but was a transaction in which goods belonging to the defendant were to be sold as the result of a joint undertaking by the combined efforts of the plaintiff and the defendant, on the terms and conditions agreed upon, and the proceeds applied first to reimbursing and compensating the plaintiff, the balance to go to the defendant. In the meantime, to secure the plaintiff for the advances which by the terms of the agreement he was to make for the payment of duties and for rent and salaries and for his own services, the defendant executed to him as a part of the transaction, as is found by the master, a bill of sale of the goods.

This was the transaction in substance. Notwithstanding the bill of sale, the agreement proceeded on the footing that the defendant retained an interest in the goods, and was the beneficial owner. What was to be advanced by the plaintiff was to be advanced, not as a part of the price or value of the goods, for no price or value was agreed upon, but as part of a common undertaking which had for its object the ultimate sale of the defendant's goods in the course of trade to customers. The transaction did not, therefore, constitute, in any just sense, a sale of goods, wares or merchandise within the meaning of the statute of frauds. *Bullard* v. *Smith*, 139 Mass. 492. It is not necessary to consider whether if executed and recorded the writing would have constituted a mortgage, and, if so, whether a mortgage of personal property is within the statute of frauds; as to which see *Gleason* v. *Drew*, 9 Greenl. 79, and Browne, St. Frauds, § 294, in which that case is criticised. The master's ruling that the agreement was not within the statute of frauds was right, irrespective of the reason which he gave for it.

The question raised by the exceptions to the supplemental re-

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port is in substance that the master erred in finding, as he did, that the defendant was to execute certain papers to the plaintiff before the plaintiff was to advance the money required and agreed upon, and that the plaintiff was relieved by the conduct of the defendant from making any further offer or tender than that which he did make. So far as the question raised involves matters of fact, it is enough to say, that the evidence is not reported, and the correctness or incorrectness of the findings cannot, therefore, be considered. So far as the question involves matters of law we see no error in the overruling of the exceptions.

Decree affirmed.

C. W. Spencer, for the defendant.
W. B. Grant, for the plaintiff.

THOMAS A. CALLAHAN, trustee, *vs.* ABRAHAM ISRAEL & another.

Worcester. January 12, 1904. — September 8, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Bankruptcy, Powers of trustee. *Attorney. United States District Court.*

It is no defence to a suit in equity by a trustee in bankruptcy, to recover assets of the bankrupt alleged to be in the possession of the defendant, that the plaintiff did not obtain leave to bring the suit from the court by which he was appointed.

The rule of the United States District Court for the District of Massachusetts, that the attorney of record of the bankrupt shall not act for a creditor or for the trustee in bankruptcy, applies only to proceedings in bankruptcy, and it certainly is no defence to a suit in equity brought by the trustee in bankruptcy to recover assets of the bankrupt alleged to be in the possession of the defendant, that the plaintiff's attorney was attorney for the bankrupt in the bankruptcy proceedings.

BILL IN EQUITY, filed March 2, 1903, by the trustee in bankruptcy of one Davis Kritcher, to recover assets of that bankrupt alleged to be in the possession of the defendant Israel, praying for an accounting with Israel and for other relief.

The defendant Israel filed a plea in bar, setting up the alleged defences that the suit could not be maintained because, first, the

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plaintiff did not, before bringing the suit, obtain authority from the bankruptcy court or referee to bring it, and, second, because the counsel, who brought the suit, was counsel for the bankrupt in the bankruptcy proceedings, and was for that reason disqualified to act for the trustee of the bankrupt's estate in this suit. The plaintiff filed a replication to the plea.

In the Superior Court the case was heard upon the bill, plea and replication by *Gaskill*, J., who *pro forma* sustained the plea in bar of the defendant Israel, and reported the case for determination by this court. If the plea should be sustained upon the first ground, the bill was to be dismissed with costs; but, if the plea should be overruled as to the first ground, the case was to stand for trial in the Superior Court. If the plea should be sustained upon the second ground, the case was to stand for trial in the Superior Court, upon the withdrawal of Mr. Merrill, as counsel for the plaintiff, if in the opinion of the court that course was proper; but, if the plea should be overruled upon the second ground, the case was to stand for trial in the Superior Court, and such further order or decree was to be made as the court might deem proper.

C. A. Merrill, for the plaintiff.

R. Hoar for the defendant Israel.

BARKER, J. 1. The first question raised by the plea is whether the fact that the plaintiff, who is a trustee in bankruptcy, brought the suit without first obtaining leave of the court by which he was appointed or of its referee, is a good defence.

Section 47 of the bankruptcy act of 1898, clause 2, requires trustees to "collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest."

Because of the phrase "under the direction of the court" it is contended that a trustee cannot institute a suit without some express leave or direction.

But that phrase, if intended to limit the power of a trustee in bringing actions, does so only because it limits every act of a trustee, in collecting and reducing to money the property of the estate. It was not the intention of Congress that a trustee could not make a demand for payment, receive money offered in pay-

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ment, or take any of the usual means to collect and reduce to money the estate, the title of which had vested in him, without some specific direction so to do. The clause was merely intended to give the court power to direct the proceedings of its trustees, if occasion for such direction should arise in any specific instance, and not to place upon the court the burden of giving constant directions as to the reducing of the property to money.

The title to the estate is vested in the trustee. U. S. St. 1898, c. 541, §§ 70 *a*, 21 *e*, *g*. There is no reason to hold that he has not the right of an owner to bring suit to collect his property, save as it is clearly expressly limited by the act. The only such limitations are found in § 11, and relate only to suits brought by or against the bankrupt before the proceedings in bankruptcy and pending after the appointment of the trustee. Other portions of the statute imply that the trustee is expected to bring suits. U. S. St. 1898, c. 541, §§ 11 *d*, 23 *b*. The provisions in §§ 26 and 27 with reference to submissions to arbitration and to compromises under which the trustee may submit to arbitration "pursuant to the direction of the court" and may compromise any controversy "with the approval of the court" would be redundant, if, as is contended by the defendant, the trustee could take no steps to reduce the estate into money except by direction of the court. The implication that the trustee must act upon his own responsibility and judgment in bringing suits seems to us clear. See *In re Baber*, 119 Fed. Rep. 520; *Pease* v. *McQuillin*, 180 Mass. 135, 137.

2. The remaining question is whether the fact that the plaintiff's attorney in the case at bar was attorney for the bankrupt in the bankruptcy proceedings is a bar to the prosecution of the suit. The contention is that an order of the United States District Court for the District of Massachusetts adopted on October 21, 1899, which provides that "The attorney of record of the bankrupt shall not act for any creditor or for the trustee in bankruptcy proceedings" makes the fact stated a good defence. We need not inquire whether a rule of the United States District Court can have operation in the State courts. It is plain that the order quoted has application only to proceedings in bankruptcy, and that the case at bar is not a proceeding in bankruptcy. In *Keyes* v. *McKerrow*, 180 Mass. 261, which was

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a suit by an attorney to recover compensation, it was said that "there may be matters . . . in which the bankrupt's attorney might serve the trustee without impropriety." At any rate, the fact pleaded is not a good defence.

Order sustaining plea reversed; case to stand for trial in the Superior Court.

FRED L. CARTER & others *vs.* A. W. DODD.

Suffolk. January 14, 1904. — September 8, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Contract, Construction, Performance and breach. *Sale.*

An agreement headed "Contract" was as follows: "Gloucester, Mass., June 2, 1902. Messrs. C. C. & M., Boston, Mass. We this day enter you on contract for the following: Article, Jervell's 1902 Norwegian Cod Oil. Quantity: 10 bbls. Price: $33 per bbl. F. O. B. Boston. Terms: Net 30 days, less 1% 10 days. Deliveries: To be delivered in lots as wanted prior to April 1st, 1903. D. & Co." "Accepted, C. C. & M., 6/3/02." In an action by C. C. & M. against D., doing business as D. & Co., for a refusal to deliver certain barrels of oil demanded under this contract after April 1, 1903, it was *held*, that there was nothing in the instrument, as construed in the light of the correspondence between the parties, to show clearly a sale of ten barrels of oil for future delivery rather than an agreement to sell that number of barrels if called for before April 1, 1903, and that the plaintiffs had not sustained the burden of proving a breach of contract by the defendant.

CONTRACT, against A. W. Dodd, doing business in Gloucester as A. W. Dodd and Company, for alleged breach of an agreement in writing to deliver ten barrels of Norwegian cod oil to the plaintiffs at the price of $33 a barrel, the defendant having delivered only seven barrels of the oil and having refused to deliver three others, the delivery of which was demanded after April 1, 1903. Writ dated May 11, 1903.

In the Superior Court *Gaskill*, J. ordered judgment for the defendant on an agreed statement of facts, the substance of which is stated in the opinion. The plaintiffs appealed.

F. E. Bradbury, for the plaintiffs.

E. S. Taft, for the defendant, submitted a brief.

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BARKER, J. Whether the judgment for the defendant is to be affirmed depends upon the question whether the contract of June 2, 1902, is to be construed as a contract under which the plaintiffs could take the oil only before April 1, 1903, or as an absolute agreement on the part of the defendant to deliver it before that date and on the part of the plaintiffs to take it before that date.

The contract is said by the agreed statement of facts to have been in these words:

"Contract.

"Gloucester, Mass., June 2, 1902.

"Messrs. Carter, Carter & Meigs,

Boston, Mass.

"We this day enter you on contract for the following:

"Article, Jervell's 1902 Norwegian Cod Oil.

Quantity: 10 bbls.

Price: $33 per bbl. F. O. B. Boston.

Terms: Net 30 days, less 1% 10 days.

Deliveries: To be delivered in lots as wanted prior to April 1st, 1903.

"A. W. Dodd & Co."

"Accepted, Carter, Carter & Meigs, 6/3/02."

The absence from this writing of words which unequivocally indicate a sale is significant. The words "bought" or "sold" do not appear. The general form is not that of a bill of goods sold for future delivery. The first word "Contract" placed as a heading or catchword is as well adapted to indicate a contract to be binding only to a certain date as to an absolute sale. So also is the next important clause, set down in the place where the essence of the contract naturally would be found. If the intention was that the plaintiffs should at all events sell and the defendant buy, language unequivocally indicating a sale and purchase would be expected here. The words used, "We this day enter you on contract," are equally consistent with either construction. The clauses as to quantity, price and terms are consistent also with either construction. So also the remaining clause of the contract, as given in the agreed statement, as to deliveries — "To be delivered in lots as wanted prior to April 1st, 1903," and the single word "Accepted" placed across the

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face of the document over the defendant's signature. Looking at the written agreement alone as set out in the agreed statement the judgment for the defendant was right, because the language of the contract is so equivocal that it cannot be held to establish the plaintiffs' case.

The agreed statement of facts contains no authority to the court to draw inferences. It states that the plaintiffs are wholesale druggists and that the defendant is a dealer in oils. It recites two letters and a telegram leading up to the making of the agreement, the facts with reference to a similar agreement between the parties which had matured or expired on April 1, 1902, and also that the defendant had on hand at all times a sufficient quantity of the oil, that the ten barrels were not marked, separated or set aside from the general stock, and that its value on and after April 1, 1903, was $100 per barrel.

In the first letter the defendant, after stating that the market is firm and that there is every indication that prices will be higher, writes: "We can offer you on contract, to be delivered to you as wanted up to April 1, 1903, your requirements of . . . oil, at $33 per barrel . . . and we will protect you against decline in price. We would strongly advise you to place your order at once." This letter was answered by a telegram, "Enter contract ten barrels Norwegian oil as per your letter," and on the same day the plaintiffs wrote confirming their telegram and saying, "you to protect us against decline, the same [i. e., the oil] to be taken between now and April 1st, 1903."

The most significant statement in the correspondence is that clause of the plaintiffs' letter, saying "the same to be taken between now and April 1st, 1903." Standing alone this would be decisive that the agreement was for an absolute sale. But it must be read with the offer in the defendant's letter "to be delivered to you as wanted up to April 1st, 1903," and with the terms of the final agreement, "To be delivered in lots as wanted prior to April 1st, 1903," and with the fact that the plaintiffs did no act toward taking the last three barrels of the oil until some days after April 1, 1903.

The history of the transaction under the similar contract of the previous year furnishes no clear guide to the intention of the parties. That contract was identical in form with the one now

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under construction and was to expire on April 1, 1902. Before that date only a part of the quantity had been delivered. On April 10, 1902, the plaintiffs wrote: "Please ship us two barrels cod liver oil. We note that our contract expired April 1st. You may send us bill of the balance of the contract, and we would like to have you hold the goods subject to our order, or if you insist, you may send the whole of the goods now, but write us first." The most natural construction of this letter seems to be that the writer acknowledged that the contract was no longer binding; that he gave an absolute order for two barrels of oil, and suggested that the defendant should deal with the writer as though the contract were still open, while by implication the writer denied the right of the defendant to force acceptance of the oil covered by the contract and not called for before its expiration. Certainly it is not the letter of a party who acknowledges that he is bound to accept a certain quantity of goods at a certain price under a matured contract of sale. On receipt of the letter the defendant wrote enclosing bill of the two barrels which he shipped on the same day and saying, "This makes four barrels more due you on your contract, which we have invoiced to you, which we will hold subject to your order and your request." In this letter were separate bills of the two and the four barrels, on the latter of which bills were the words "Balance contract. To be shipped when ordered", and the four barrels were shipped in the summer of 1902. The defendant's action upon this earlier contract was not an admission in terms that the contract was for an absolute sale. His letter when read with that of the plaintiffs is entirely explicable on the theory that in the then state of the market he was willing to sell the plaintiffs two barrels of oil for present delivery, and to set apart for them four more barrels for future delivery at the price named in a contract which had expired on April 1, 1902. Taking the whole statement as to this earlier transaction it has no decisive bearing.

On April 8, 1903, the plaintiffs having previously taken seven of the three barrels wrote to the defendant: "Please ship us balance of our contract for Norwegian C. L. Oil and oblige." To this the defendant replied on April 9: "Replying to your favor of the 8th, would say that all our Norwegian cod liver oil

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contracts expired April 1st, and we sold over a month ago all that would be left on hand at the expiration at that time, and so are unable to ship the remainder of your contract, namely, three barrels. Some of our contracts were made at a very low figure, and in the present condition of the Norwegian market we thought we were justified in taking advantage of it." On April 11, 1903, the plaintiffs wrote renewing their demand for the three barrels and saying "You know very well it was your duty to have notified us on April 1st or before April 1st that these goods were at your place subject to our order. Your contract says to be delivered in lots as wanted prior to April 1st. It was your duty to ship us the three barrels or notify us. The previous year you billed us the balance of the contract and held it subject to our order. Why did not you do it this year?" At about the same time in conversation with the defendant a representative of the plaintiffs said that he had been absent for a month, and that if he had been at home the lot would have been ordered earlier, as they were almost out of it. All of these transactions subsequent to April 1, 1903, do no more toward settling the true construction of the document of June 2, 1902, than to show that the plaintiffs contended that it meant a sale for future delivery, while the defendant treated it as a contract under which he was not bound to sell unless the plaintiffs called for the goods before a certain time.

The plaintiffs' declaration sets out the document of June 2, 1902, but with an additional term not shown in the agreed statement of facts, namely, "Conditions of sale. — If at the time of any delivery seller's price for the article sold shall be lower than the figure stipulated in this contract, buyer is to have benefit of decline to the extent of such difference on that delivery. Seller not liable for loss or detention of supplies through causes beyond control, or other unavoidable contingencies." The declaration alleges that by the contract the plaintiffs agreed to purchase of the defendant and the defendant agreed to sell to the plaintiffs ten barrels of oil. The defendant "for answer, says that the contract set forth in the plaintiffs' declaration was made."

We now cannot assume that the contract contained an additional term not shown by the agreed statement. But if that assumption should be made, the added term does not make it

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certain that the agreement was for an absolute sale. The stipulation as to a decline in the seller's price becomes operative only upon an actual delivery under the contract, which delivery would work a sale *pro tanto* although the contract was not to be binding after a certain date; and the stipulation as to loss or detention of supplies through causes beyond control or other unavoidable contingencies would not be insensible in such a contract.

The burden of showing that they are entitled to recover is upon the plaintiffs, and we cannot see that they have sustained it by showing a contract of sale and purchase, or a breach of such a contract by the defendant.

Judgment for the defendant affirmed.

LOUIS KROWER & another *vs.* ABRAHAM J. FELZ & others.

Suffolk. January 25, 1904. — September 8, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Equity Pleading and Practice, Decree. *Equity Jurisdiction*, To reach and apply equitable assets.

A decree of the Superior Court, dismissing a bill in equity so far as it relates to the facts stated in a certain amendment, is final unless appealed from.

In this suit in equity under R. L. c. 159, § 3, cl. 8, to reach and apply to a debt due the plaintiff certain property fraudulently conveyed by the debtor to a certain corporation, it was held that the plaintiff was entitled to equitable relief, there being evidence of fraud on the part of the debtor and of the corporation.

BARKER, J. 1. By an amendment to the bill the plaintiffs made allegations designed to show that the transaction by which the principal defendant parted with title to his stock of merchandise and machinery on or about August 11, 1903, came within the provisions of St. 1903, c. 415, as a sale of merchandise in bulk in fraud of creditors. The judge who heard the case in the court below found that the allegations in the amendment were true but ruled that the plaintiffs were not entitled to maintain their bill under the amendment, and dismissed the bill so

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far as the facts alleged in the amendment were part of the plaintiffs' cause of action.

As there was no appeal by the plaintiffs there is before this court no question arising under the provisions of St. 1903, c. 415, and we do not discuss or decide upon the effect or the constitutionality of that statute.

2. The cause was tried before the lower court as a bill under the provisions of R. L. c. 159, § 3, cl. 8, to reach and apply in payment of a debt due the plaintiffs from the defendant Abraham J. Felz certain personal property of his liable to attachment and fraudulently conveyed by him with intent to defeat and defraud his creditors. The evidence was taken and reported under Chancery Rule 35. Upon it the presiding judge found that when Felz conveyed the property sought to be reached he was insolvent and unable to pay his debts as they matured; that he made the conveyance with the intent to defraud his creditors and to hinder and delay the plaintiffs as well as his other creditors, and that the defendant corporation, to whom the sale was made, through its officers participated in his fraud and assisted him in committing it, and that the sale was void. Upon these findings a final decree was entered for the plaintiffs establishing their debt and ordering judgment and execution, enjoining the defendants from disposing of the property which was the subject of the fraudulent sale and ordering them to convey to the plaintiffs so much of it as might be necessary to satisfy the plaintiffs' judgment. The case is here upon the defendants' appeal from the final decree. They raise no question as to the form of the decree if relief is to be given.

We have examined the report of the evidence and are of opinion that the findings of fraud on the part of the debtor and of the corporation, in the making of the sale to the corporation of the debtor's property were justified by the evidence. This being so, the fact that the corporation was not created solely for the purpose of committing the fraud is immaterial. The facts found make a case for equitable relief under the provisions of R. L. c. 159, § 3, cl. 8.

Decree for the plaintiffs affirmed.

S. Lewenberg, for the defendants.

J. H. Blanchard, (*S. O. Reinstein* with him,) for the plaintiffs.

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MARY F. PARKER *vs.* BOSTON SAFE DEPOSIT AND TRUST COMPANY, trustee.

Middlesex. February 25, 1904. — September 8, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Probate Court. Trust, Accounts of trustee. *Words*, "Notice."

Under Pub. Sts. c. 144, § 9, accounts of a trustee settled in the absence of a person adversely interested and without actual notice to him, where there has been no hearing, may be reopened on the application of such person at the settlement of any subsequent account of the trustee. Section 14 of the same chapter, making a decree allowing the account of a trustee or guardian conclusive except in cases of fraudulent concealment or fraudulent misrepresentation on the part of the accountant, relates only to final accounts.

LATHROP, J. This is a petition, filed November 19, 1902, in the Probate Court, by a *cestui que trust* for life under a will, to open the first six accounts of the trustee, for the purpose of charging the trustee for an investment made February 24, 1888, in a mortgage of land in Minneapolis in the State of Minnesota, to the amount of $3,500. By a decree of the Probate Court the first six accounts were allowed to be opened "as to all items which relate to the investment by the trustee in a mortgage of real estate in Minneapolis, in the State of Minnesota, by Abbie E. Gilmore, and to matters connected with such investment and mortgage." From this decree the trustee appealed to this court. The case was heard before a single justice, who has reported for our consideration a single question of law, namely the right of the Probate Court to reopen the accounts.

It is obvious, at the outset, that the petitioner is not aggrieved by the first account, as the investment was made between the filing of the first and second accounts.

The other accounts were allowed on the following dates: the second account was allowed on September 9, 1890; the third, on March 3, 1891; the fourth, on March 22, 1892; the fifth, on April 11, 1893; the sixth, on March 27, 1894. All the accounts were allowed, after publication but without personal notice to the life tenant or a hearing. There are eight later accounts still unsettled in the Probate Court.

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It appears by the report that "the contention made by the trustee was that the Probate Court had no authority to open the accounts because there was no allegation in the petition of fraudulent misrepresentation or fraudulent concealment; that by force of the Pub. Sts. c. 144, § 14, the effect of the decree of the Probate Court allowing the six accounts was conclusive and final against the petitioner who was legally competent and of lawful age at the time, in the absence of fraudulent concealment and fraudulent misrepresentation."

Before considering the meaning of the section relied upon by the respondent it is necessary to go back to the earlier statutes.

The first act on the subject appears in the Rev. Sts. c. 67, § 10. This was adopted by the committee to revise the report of the commissioners. See p. 90 of their report. This section reads as follows: "When an account is settled in the absence of any person adversely interested, and without notice to him, the account may be opened, on the application of such person, at any time within six months thereafter; and upon every settlement of an account by an executor or administrator, all his former accounts may be so far opened, as to correct any mistake or error therein; excepting that any matter in dispute between two parties, which had been previously heard and determined by the court, shall not be again brought in question by either of the same parties, without leave of the court." This language appears in the Gen. Sts. c. 98, § 12. By the St. of 1870, c. 366, the provision of the Gen. Sts. c. 98, § 12, was made applicable to trustees. The provisions of the General Statutes, so amended, appear in the Pub. Sts. c. 144, § 9.

These statutory provisions were in accordance with the law as it had been administered previously by this court. *Stearns* v. *Stearns*, 1 Pick. 157. *Stetson* v. *Bass*, 9 Pick. 27. *Longley* v. *Hall*, 11 Pick. 120. *Boynton* v. *Dyer*, 18 Pick. 1. *Blake* v. *Pegram*, 101 Mass. 592.

By the St. of 1877, c. 199, § 1, provision was made that upon the filing of any account by a trustee or guardian in the Probate Court, or at any hearing thereon, for the appointment of a guardian, if it appeared to the court that the interest of any person unborn, unascertained or otherwise legally incompetent, was not represented otherwise than by the accountant, the court

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might, and upon the request of any person interested should, appoint some competent and disinterested person, to represent his interest in the case. Section 3 of the act was as follows: "The decree of the court having jurisdiction, allowing any account of a trustee or guardian, shall be final and conclusive, against all persons interested who are of lawful age and legally competent, and have had actual notice of the same, unless an appeal therefrom is taken within thirty days thereafter, except in case of any fraudulent concealment by such accountant."

The St. of 1879, c. 161, made the same provision for the appointment of a guardian, and provided in § 8, as follows: "The decree of the court having jurisdiction, allowing any account of a trustee or guardian, shall be final and conclusive against all persons interested and legally competent at the date thereof and against all other persons interested, or who might by possibility be interested, although unborn, unascertained, or otherwise legally incompetent, whose guardian *ad litem* or next friend after having been duly qualified, has assented thereto, or been heard thereon, unless the same is appealed from in the manner, and within the time provided by chapter one hundred and seventeen of the General Statutes, except always in case of fraudulent concealment or fraudulent misrepresentation on the part of the accountant."

Section 4 repealed "All acts and parts of acts inconsistent herewith."

The provisions of the St. of 1879, c. 161, are re-enacted in the Pub. Sts. c. 144, § 14, with some verbal changes. There would be ground for holding that the St. of 1879, repealed the St. of 1877, c. 199, and the Gen. Sts. c. 98, § 12, but the Legislature has in the Pub. Sts. c. 144, §§ 9, 14, re-enacted both the Gen. Sts. c. 98, § 12, and the St. of 1879, c. 161, § 3. The subject matter was again revised by the St. of 1889, c. 466, which goes back to the language of the Pub. Sts. c. 144, § 14, with some slight changes. The St. of 1895, c. 288, § 2, expressly repeals the Pub. Sts. c. 144, §§ 13, 14, and all acts in amendment thereof. Section 1 of this chapter, however, provides for the appointment of a guardian, and proceeds as follows: "And thereupon, the decree upon said account shall have the same effect upon all items thereof as in the case of the allowance of matters in dispute" under the Pub. Sts. c. 144, § 9. The law as it stands to-day is found in the

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R. L. c. 150, §§ 17, 22. Section 17 is the same as the Pub. Sts. c. 144, § 9, and § 22 is based upon the St. of 1895, c. 288, but omits the reference to the effect of the decree.

All of the accounts which it is sought to reopen were allowed after the passage of the St. of 1889, c. 466, and before its repeal. But as this statute made no change in the Pub. Sts. c. 144, § 14, so far as the question before us is concerned, we may consider the case upon the Public Statutes. The question then is how to reconcile §§ 9 and 14. We are of opinion that force and effect must be given to both of them, and that they must be construed together. Section 9 is explicit to the point that where there has been no hearing the prior accounts may be reopened, and we must construe the word "notice" as meaning actual notice. Section 14 must be construed to relate to final accounts only.

There are other questions argued by the appellant, but we understand that these are not presented to us by the report.

The decree of the Probate Court must be

Affirmed.

J. E. Farnham, for the petitioner.

C. K. Cobb & W. D. Whitmore, Jr., for the respondent.

RICHARD M. YARNOLD, administrator, *vs.* GEORGE BOWERS & another.

Middlesex. March 1, 1904. — September 8, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Contributory.

If a person in a rowboat permits another person to do all the rowing and have charge of the boat, he cannot recover from the proprietor of a steamboat for an injury caused by a collision with the steamboat to which the negligence of the rower contributes, especially where there is no negligence on the part of those in charge of the steamboat.

MORTON, J. The plaintiff's intestate, his minor son, was drowned June 30, 1899, in a collision between a small boat in which he was, and a steamboat owned and run by the defendants

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on Tyng's Pond in Tyngsboro in this State, and this is an action to recover damages for the injuries sustained by the plaintiff's intestate in his lifetime in consequence of the alleged negligence of the defendants. There was a verdict for the plaintiff and the case is here on exceptions by the defendants to the admission and exclusion of evidence and to the refusal of the judge to rule as requested that the plaintiff was not entitled to recover.

We think that the ruling requested should have been given, and that the exceptions must be sustained. The defendants had a summer hotel on the southerly side of the pond at a place called Willow Dale and a small wharf for their steamboat. About half a mile in a northeasterly direction on the easterly shore of the pond was another small wharf also belonging to the defendants and used by them in their business, called Lakeview. During the summer season the steamboat plied between these points making two or three trips an hour for the conveyance of passengers. Tyng's Pond is about a mile long and three quarters of a mile wide in its widest part. The testimony showed that the steamboat always followed the same course in going back and forth between the two wharves, or landings. About nine o'clock in the evening the plaintiff's intestate and a companion by the name of Thorn and two young ladies started in a small rowboat from Willow Dale to go to Lakeview. The night was dark. There was no moon though some stars. Thorn did all the rowing and had charge of the boat with the consent of the plaintiff's intestate. They were cautioned before they started to look for the steamboat. Thorn was familiar with the course of the steamer and knew that she was then at Lakeview, and that her next trip would be from Lakeview to Willow Dale, and that on the route that they took to Lakeview they would meet the steamer and cross her course somewhere. They had been out only a few minutes when they heard the whistle of the steamboat blow, and heard the steamboat, and one of the young ladies told them to look out for the steamboat. The steamboat was then about one hundred and fifty feet away. Thorn thereupon changed his direction so as to row towards the shore and directly across the steamboat's course, and continued to row in that direction until the collision occurred. At the time of the collision the plaintiff's intestate was standing up in the boat, and the

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shock caused him to fall overboard. As soon as those in charge of the steamboat saw the small boat they shouted a warning to those in it, and changed the course of the steamboat with the result that the steamboat struck the small boat only a foot from the bow, and did not upset it or cause it to ship any water, only slewed it round as Thorn testified, and the only one injured was the plaintiff's intestate. Though it is stated in the exceptions that "there was a conflict of evidence as to the number and kind of lights on the steamer," it is plain that there were lights on the steamer, and the uncontradicted evidence tended to show that she could be seen and heard at a considerable distance, — all over the pond some of the witnesses testified. The steamer was following her usual course which was known to Thorn, and was going, for aught that appears, at her usual speed. There is nothing to show that any precautions were neglected by those in charge of the steamer which if followed would have tended to avoid the accident. The fact that the boat was not discovered, by those in charge of the steamer, till too late to avoid a collision, does not seem to us under the circumstances any evidence of negligence on their part. The night was dark, and the boat was small, and no light was shown or noise made by those in the boat to warn those in charge of the steamer of its presence. As soon as the boat was discovered, those in charge of the steamer appear to have done all that could be done to avoid a collision, and to have been so far successful that the boat was not upset, and did not ship any water, and no one except the plaintiff's intestate was injured, and he would in all probability have escaped if he had been sitting down instead of standing up. We see no evidence of negligence on the part of those in charge of the steamer, and it seems to us plain that Thorn was not in the exercise of due care. The plaintiff contends that his intestate is not to be affected by Thorn's negligence. But the case of *Allyn* v. *Boston & Albany Railroad*, 105 Mass. 77, is decisive on that point. As already observed, the uncontradicted evidence showed that Thorn did all the rowing and had charge of the boat with the consent of the plaintiff's intestate. Under such circumstances the plaintiff was bound to show that Thorn was in the exercise of due care as a condition of recovery. There is nothing in *Murray* v. *Boston Ice Co.* 180 Mass. 165, or *Ran-*

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dolph v. *O'Riordon*, 155 Mass. 331, which affects *Allyn* v. *Boston & Albany Railroad* as applied to the circumstances of this case. We see no error in the admission or exclusion of testimony.

Exceptions sustained.

W. H. Bent, for the defendants.
D. J. Donahue, for the plaintiff.

ELIZABETH WEATHERBEE *vs.* W. H. LITCHFIELD, administrator, & another.

Plymouth. March 9, 1904. — September 8, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Gift. Savings Bank.

A person under obligation to W. declared that he intended to give her a certain savings bank book, having previously declared his intention of leaving her something, and when about to make his will sent for the savings bank book and gave directions to his lawyer, which were not intended to pass the property immediately either as a *donatio causa mortis* or as a gift *inter vivos* to the lawyer in trust for W., but to provide for giving the property to W. by his will. He was to complete his will on the following day, but died the next morning. *Held*, that W. could not maintain a suit in equity against the administrator of the deceased for the possession of the savings bank book or the money represented by it.

MORTON, J. This is a bill to have a savings bank book, and the money represented thereby, in the hands and possession of the defendant Litchfield as administrator of the estate of one George L. Curtis, late of Scituate in the county of Plymouth, decreed to be the plaintiff's property and Litchfield ordered to deliver the same to the plaintiff, and to execute and deliver to her such transfers as may be necessary. In the Superior Court the case was sent to a master, and, upon the coming in of his report, the plaintiff filed exceptions thereto which were overruled, and a decree entered confirming the report and dismissing the bill with costs. The plaintiff appealed; the evidence is not reported.

The master found, amongst other things, that Curtis had been

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in the habit for twenty years or more of staying two or three weeks at a time in the home of the plaintiff who was the wife of John Weatherbee. He came and went at will and paid no board. Two weeks before his death he left the Weatherbees and went to live with a family by the name of Totman where he had lived in the same manner as with the Weatherbees. Before he left he told Mrs. Weatherbee that he intended to give her a bank book, and on several occasions said that he should do something handsome for her, and, on the day he left, expressed to her his intention of leaving her something. So far as appears, however, from the facts found by the master, Curtis did not at any time before leaving Mrs. Weatherbee's actually make her a gift or present of a bank book or of any sum of money. After he went to the Totmans he talked more than once about making a disposition of his property, and said that he was going to give Mrs. Weatherbee his Hingham bank book. While he was at the Totmans a nephew filed a petition for the appointment of a conservator, and the citation was duly served on him, and he sent for the defendant Fogg, who is an attorney at law, to consult with in reference thereto. About the same time he also sent for a physician who found him critically ill, and, without telling him of his condition, advised him to make a will. He had some talk with Fogg about the disposition of his property and Fogg also advised him to make a will. Curtis said he would send for his bank books, which were in the possession of one Litchfield, not the defendant, which he did, and the following day sent for Fogg who came up to the Totman house. When he got there, Curtis and Totman were in the dining room. Curtis waited till Totman went out, and then Curtis proceeded to give Fogg directions as to the disposition of the bank books and his other property. When Totman went out of the room he took a seat in an adjoining room where he could see a part of what took place, and, as he testified, could hear all that was said, and there was some conflict of testimony between him and Fogg as to what occurred. Arrangements were made for the completion of the will on the following day, but Curtis was found dead in his room the next morning.

The master's report concludes as follows: "I find that Curtis evidently intended to make a present to Mrs. Weatherbee but I do not find that such intention was carried out in a manner

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which can be given effect. I find that his intention was that the gift should take effect through the will which he proposed to make, and that the directions given to Fogg were not intended to pass the property to Mrs. Weatherbee immediately either as a *donatio causa mortis* or as a gift *inter vivos* or to Fogg as trustee for Mrs. Weatherbee but were directions merely for specific legacies to be given in the will which he proposed to make, and a draft of which was actually prepared by Fogg in accordance with such directions. It follows, therefore, that the plaintiff is not entitled to prevail against either defendant."

These findings were warranted by the other facts found by the master and are decisive of the case. There is no doubt that Curtis contemplated making a gift to Mrs. Weatherbee and that he declared his purpose to do so. But there is nothing before us to show that the finding of the master that he intended that the gift should take effect through the will that he proposed to make was erroneous, or to warrant us in overruling his findings that the directions given to Fogg were not intended to pass the property to Mrs. Weatherbee immediately either as a *donatio causa mortis*, or as a gift *inter vivos*, or to Fogg as trustee for Mrs. Weatherbee. Without taking up seriatim the exceptions to the master's report we deem it enough to say that we think they were all rightly overruled and that the decree should be affirmed.

So ordered.

D. G. Haskins, Jr., for the plaintiff.

E. N. Hill, for the defendants, was not called upon.

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LILLIAN W. WILLIAMS, administratrix, *vs.* MINNIE E. MOULTON, executrix, & another.

Suffolk. March 10, 1904. — September 8, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Gift. Savings Bank. Assignment.

Whether one having a deposit in a savings bank, who signs an order directing the bank to pay the deposit and the dividends thereon to a certain person, makes a gift of the deposit to the person named, or whether he merely gives the order to enable the other person to draw money for him as a matter of convenience, is a question of fact depending on the intent of the assignor.

LATHROP, J. This is a bill in equity brought by the administratrix, with the will annexed, of the estate of Edmund Pearson, against the executrix of the will of Emma A. Montague, and the Franklin Savings Bank, to recover possession of a savings bank book issued by the last named defendant to Edmund Pearson, and also to recover an iron box containing a certain sum of money. The case was heard before a judge of the Superior Court, on oral evidence taken by a commissioner appointed under Chancery Rule 35.

The judge found that Edmund Pearson in his lifetime deposited in the defendant bank the sum of $1,000, and that he received a deposit book from the bank; that afterwards, on December 6, 1898, he signed an order directing the bank to pay the deposit and dividends thereon to the defendant Moulton's testatrix; that from then to the day of his death in March, 1903, he was an old man in infirm health, and was suffering from rheumatism which affected seriously the use of his hands, eyes and feet; that the order was made for the purpose of enabling the defendant Moulton's testatrix to draw, from time to time, such portion of the deposit as he should need or desire; that he did not intend to give, and did not give, the deposit to the defendant Moulton's testatrix; that he kept control and possession of the book of deposit, although with other of his property he kept it in a box which contained property belonging to her, which box had

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belonged to him, but which within two years before his death he gave to her.

Subsequently a decree was entered in favor of the plaintiff for the deposit book, and in favor of the defendant Moulton for the iron box and the money therein. It was further ordered that the savings bank be allowed to retain its costs to be taxed by the clerk, and that the defendant pay costs to the plaintiff.

From this decree the defendant appealed to this court, but the plaintiff did not appeal; and the case is before us on a full report of the evidence.

The only question on this appeal is whether the order was given, as the plaintiff contends, merely for purposes of convenience to enable Pearson to make withdrawals without any personal act on his part, or whether, as the defendant contends, the transfer was made as an absolute gift. The evidence in the case was contradictory, but we have no reason to doubt that the judge who saw the witnesses came to a correct conclusion upon the evidence. From the testimony it appears to be a plain case. It would serve no useful purpose to review the evidence, as the question is purely one of fact. *Booth* v. *Bristol County Savings Bank*, 162 Mass. 455.

Decree affirmed.

F. M. Forbush, for the defendant Moulton.

E. A. Whitman, for the plaintiff.

COMMONWEALTH *vs.* FRANK KELLY.

Suffolk. June 21, 1904. — September 8, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & LORING, JJ.

Evidence, Of conduct of accomplice, In rebuttal.

On a trial for assault and robbery, where two defendants have been indicted jointly but only one is tried, there being evidence that the robbery occurred between half past eight and nine o'clock in the evening of a certain day, and that the absent defendant was an accomplice of the defendant on trial, a witness for the government may testify that the absent defendant lived in his house about two months, that he last saw him in his house between half past nine and ten

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o'clock on the evening of the robbery, that he was not alone, and that the voice of the person with him was that of the defendant on trial.

On a trial for assault and robbery, where the person robbed has testified that she recognized the defendant as the person who assaulted and robbed her, and the defendant contends and has introduced evidence to show that when the police officers called on the person robbed about half an hour after the robbery she did not mention the defendant's name, the government after the close of the defendant's evidence may recall the person robbed to testify in rebuttal that she told the officers it was the defendant that night, "right off, as soon as they came."

MORTON, J. The defendant was indicted jointly with one Bradley for assaulting one Julia Haverson and robbing her of the sum of $18 on December 8, 1903, in the Dorchester District in Boston. Bradley was not on trial and was not used as a witness, and there was no evidence as to where he was at the time of the trial. The defendant was found guilty and the case is here on exceptions by him to the admission of certain evidence. We consider only those exceptions which have been argued, treating the others as waived.

1. One Auffray was called as a witness by the Commonwealth and was allowed to testify, against the objection and subject to the exception of the defendant, that Bradley lived in his, Auffray's, house about two months, that he last saw him on December 8 in his house between half past nine and ten at night, that he was not alone, that he heard the voice of the person who was with him, and that the voice was the voice of the defendant Kelly. Testimony had been previously introduced tending to show that Bradley was an accomplice of the defendant and that the robbery occurred between half past eight and nine in the evening. It is plain, we think, that the evidence that was objected to was rightly admitted. *Commonwealth* v. *McDonald*, 147 Mass. 527.

2. The defendant introduced evidence tending to show that Mrs. Haverson did not mention his name to the police officers who called on her within half an hour or so after the robbery was committed as that of the person who had committed it, though she testified that she recognized him as the person who assaulted and robbed her. At the close of the defendant's evidence the Commonwealth recalled Mrs. Haverson and she was allowed to testify subject to the defendant's exception that she told the officers it was Kelly, that night, right off, as soon as they came, about

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nine, or a little after nine. Counsel for the defendant argued to the jury that she did not mention Kelly's name to any one on the night of the assault as that of the person who assaulted her, manifestly with the purpose of having the jury disbelieve her testimony that she recognized Kelly as the one who committed the robbery. For the purpose of meeting this argument it was entirely competent for the Commonwealth to show, if it could, as a fact, that she did mention Kelly's name to the officers. Such testimony was not hearsay testimony in any just sense.

Exceptions overruled.

J. B. Moran, for the defendant.

J. D. McLaughlin, Second Assistant District Attorney, for the Commonwealth.

EDWARD H. GARCIN *vs.* PENNSYLVANIA FURNACE COMPANY & others.

Suffolk. June 22, 1904. — September 8, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, LORING, & BRALEY, JJ.

Contract, Performance and breach. *Equity Jurisdiction*, Specific Performance, To relieve against forfeiture.

Where the time for the performance of a contract for the sale of most of the property of a corporation, including its going business and outstanding contracts, is extended by the parties for a period of one month and four days, and $2,500 is paid in cash for the extension besides the giving of additional security to be forfeited on non-performance, this shows conclusively the intention of the parties to make time of the essence of the contract.

A party to a contract of which time is of the essence who through his own fault fails in performance at the time appointed is not entitled to enforce a specific performance of the contract.

Equity will not relieve against the forfeiture of a deposit of money and stock upon the non-performance of a contract, where a fair interpretation of the contract shows the intention of the parties to be that the deposit shall be treated as liquidated damages in case of a failure to perform, and not as mere security for the performance of the contract.

BILL IN EQUITY, filed November 10, 1902, to compel the Pennsylvania Furnace Company to perform a certain agreement in writing dated August 27, 1902, as amended and extended by a supplemental agreement dated October 7, 1902, by delivering

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a deed of property of that company, as described in the opinion, or, in the alternative, for relief from a forfeiture of $2,500 in cash and two thousand shares of stock of the Pennsylvania Furnace Company, deposited by the plaintiff with the Federal Trust Company under the terms of the contract, and praying for a decree settling the amount of damage incurred by the defendant furnace company, if any, and for a reconveyance to the plaintiff of the cash and stock upon the payment of the damages so established.

The defendants filed an answer containing a demurrer for want of equity. The case came on to be heard before *Lathrop*, J., who reserved it upon the bill and demurrer for determination by the full court, the bill to be dismissed if the demurrer should be sustained.

The contract of August 27, 1902, was as follows:

"Whereas at a duly called meeting of the stockholders of the Pennsylvania Furnace Company, a corporation duly organized under the laws of the Commonwealth of Pennsylvania held at Philadelphia in said Commonwealth on the 18th day of March, A. D. 1902, it was resolved and voted, 'That Timothy E. Hopkins, John Reed and W. M. Deen be and hereby are appointed a committee of three to sell all the property, real and personal, of this corporation to such purchaser or purchasers and upon such terms as in their unanimous judgment seems for the best interests of the stockholders. Said committee shall have full power by unanimous action, to sign the corporate name and to affix the corporation seal to all deeds, conveyances or other instruments that may be necessary to complete said sale,' and

"Whereas, it was further resolved and voted, 'That the said committee be and hereby is directed, upon the completion of said sale and the receipt of the purchase money, to pay the same into the treasury of this company. The purchaser or purchasers from said committee shall, however, be under no obligation to see that said purchase price is so paid into the treasury, but the receipt of the committee shall be a discharge of said purchaser or purchasers and binding on the corporation and stockholders.'

"Now, therefore, this agreement made at New York in the State of New York on this 27th day of August A. D. 1902, between Timothy E. Hopkins, John Reed and W. M. Deen,

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acting as said committee aforesaid, hereinafter called the first party, and Edward H. Garcin of Trenton, New Jersey, acting for himself and associates, hereinafter called the second party, witnesseth:

"I. That the first party hereby agrees to sell to the second party, who agrees to purchase, for the sum of two hundred seventy thousand one hundred ($270,100) dollars in cash and the delivery of certain instruments and stock hereinafter set forth, first, the one-ninety-sixth (1/96) interest of said Pennsylvania Furnace Company in the so-called 'Cornwall Ore Banks' situated in the said Commonwealth of Pennsylvania.

"Second, the real estate of said Pennsylvania Furnace Company situated at Sheridan in the County of Lebanon and Commonwealth aforesaid, and the easements and appurtenances thereto belonging, together with the plant located thereon and all the fixtures and appurtenances at said plant and thereto belonging, not including, however, stock raw, wrought, or in process, and new supplies.

"II. That the second party hereby agrees to assume and perform all existing contracts and other obligations of said Pennsylvania Furnace Company, the fulfilment of which by said Company is made impossible by reason of its disposal of its real estate and plant as aforesaid to the second party, as per schedule 'A' hereto annexed. The contract of said Pennsylvania Furnace Company with S. H. Chauvenet, of Sheridan, Pennsylvania, the present manager of the works, shall be included in said contracts. And the second party, for his executors, administrators and assigns, agrees to keep the Pennsylvania Furnace Company, its successors and assigns, indemnified against all actions, claims and liabilities for breach of said contracts or other obligations or any of them.

"III. Payment under the terms of this agreement shall be made in the manner following, to wit; Upon the execution of this agreement and simultaneously therewith, the second party shall pay into the Federal Trust Company of Boston in the Commonwealth of Massachusetts, in trust for the first party, the sum of twenty-five hundred ($2500) dollars in cash to bind the bargain. If the second party shall refuse or neglect to complete the purchase at the time hereinafter appointed, this deposit

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money shall be absolutely forfeited to the first party, and the Trust Company shall pay over the same to the first party and this agreement and all rights thereunder of the second party shall cease. But if the purchase is completed as herein contemplated, said deposit money shall be applied to the purchase price as herein provided. The second party shall, on or before the 1st day of October A. D. 1902, deliver with appropriate endorsements and assignments to said Trust Company the four thousand (4000) shares of capital stock of said Pennsylvania Furnace Company now held and owned by E. Burd Grubb of Edgewater Park, New Jersey, together with a quitclaim and release from said Grubb of all his right, title and interest in and to said Pennsylvania Furnace Company, and a release to said Company and first party of all demands of whatever nature against said Company or said first party, whether at present existing or in the future arising, including all claims for any participation in the division of the assets of said Company. It is agreed, however, that if said Grubb cannot turn over said four thousand (4000) shares of stock as above mentioned, that in that event the cash payment to said first party shall be proportionate with the above mentioned sum of two hundred seventy thousand and one hundred (270,100) dollars; that is, that said first party shall in that event receive, in addition to the above mentioned two hundred seventy thousand one hundred (270,100) dollars an amount equal to the same ratio for every share of stock short of four thousand (4000) shares that said Grubb is unable to turn over. The second party shall also pay to said Trust Company in cash the purchase price hereinbefore named, less the sum of twenty-five hundred (2500) dollars advanced as deposit money. Whereupon on tender and delivery to the first party by said Trust Company of said purchase money of two hundred seventy thousand one hundred (270,100) dollars in cash and the stock, quitclaim and release deposited by said second party with said Trust Company as hereinbefore provided, said first party shall deliver to said Trust Company for the benefit of the second party a quitclaim deed of conveyance, duly executed, of all the property herein agreed by it to be sold to the said second party.

"IV. The second party agrees to deliver the documents, shares and purchase price hereinbefore agreed by it to be delivered to

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said Trust Company, and the first party agrees to deliver the deed to said Trust Company for the benefit of the first party as aforesaid at the office of said Trust Company in the City of Boston at twelve o'clock noon, October 1st, A. D. 1902, unless the parties hereto shall mutually agree in writing to an earlier date.

"In witness whereof the parties hereto have hereunto set their hands and seals.

	"Timothy E. Hopkins,	(S)
"Witnesses:	John Reed,	(")
"H. W. Wesson to T. E. Hopkins	W. M. Deen,	(")
& E. H. Garcin	Edward H. Garcin.	(S)

"E. A. Adler to J. R."

The supplemental contract and the receipt thereunder were as follows:

"Whereas the Pennsylvania Furnace Company, acting by Timothy E. Hopkins, John Reed and W. M. Deen as a Committee duly authorized, of the one part, and Edward H. Garcin, acting for himself and associates, of the other part, did enter into an agreement on August 27th, 1902, for the sale of certain property of said Company to said Garcin for a certain consideration, the conveyance of which property and the delivery of which consideration were by the terms of said agreement to take place at twelve o'clock noon on October 1, 1902; and

"Whereas the Pennsylvania Furnace Company as aforesaid was on said October 1 ready and willing to perform its part of said agreement, and did on said October 1 tender to said Garcin a deed duly drawn and executed, together with tax receipts for the years 1900, 1901 and 1902, but said Garcin was unable to pay the cash consideration in said agreement stipulated, whereby the twenty-five hundred ($2500) dollars named in said agreement was forfeited to the first party;

"Now, therefore, this agreement made this seventh day of October, 1902, as supplementary to said agreement of August 27, 1902, to be annexed thereto and read in conjunction therewith, Witnesseth:

"That in consideration that the Pennsylvania Furnace Company will extend the time for the performance of the agreement of said Garcin in said agreement of August 27, 1902, to twelve o'clock noon November 5, 1902, and will deposit forthwith said

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deed and tax receipts duly tendered to said Garcin at twelve o'clock noon October 1 as aforesaid in escrow with the Federal Trust Company of Boston for delivery to said Garcin at twelve o'clock noon, November 5, 1902, upon receipt by said Federal Trust Company of the consideration named in said agreement of August 27th by said Garcin to be paid, without deduction for the twenty-five hundred ($2500) dollars forfeited as aforesaid,

"The said Garcin agrees to deliver to said Committee two thousand (2000) shares of the capital stock of the Pennsylvania Furnace Company duly transferred to it, which delivery is to take place contemporaneously with the delivery of said deed and tax receipts in escrow to the Federal Trust Company. Said two thousand (2000) shares, in case said Garcin is able duly to deliver the consideration and perform the agreements set forth in said agreement of August 27th on said November 5, 1902, is to be credited to the four thousand (4000) shares of stock agreed by said Garcin in said agreement of August 27 to be delivered. But in case said Garcin is not able to so perform, then said two thousand (2000) shares shall be regarded as forfeited absolutely to said Pennsylvania Furnace Company acting by its Committee, free and clear from all demand or equity of said Garcin or any person whatsoever.

"It is expressly understood and agreed, however, that the Pennsylvania Furnace Company acting by its Committee as aforesaid in granting the extension of time herein named, does not waive any of its rights under said agreement of August 27, 1902.

"Pennsylvania Furnace Co. by Timothy E. Hopkins, John Reed, W. M. Deen, Committee.

"Ed. H. Garcin, acting for himself and associates."

"Oct. 9, 1902.

"Received from Edward H. Garcin two thousand (2000) shares of the capital stock of the Pennsylvania Furnace Company under the agreement and the supplement thereto between the Pennsylvania Furnace Company, acting by Timothy E. Hopkins, John Reed and W. M. Deen, its Committee, of the one part, and Edward H. Garcin of the other part, which agreement is dated August 27, 1902, and the supplement thereto October 8, 1902, the said two thousand (2000) shares being the first

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delivery on the four thousand (4000) shares of the capital stock of the Pennsylvania Furnace Company referred to in the above agreement as having to be turned in by Edward H. Garcin.

"Timothy E. Hopkins, John Reed, W. M. Deen, Committee."

P. F. Hall & E. A. Adler, for the Pennsylvania Furnace Company and John Reed.

S. L. Whipple, W. R. Sears & H. W. Ogden, for the plaintiff.

KNOWLTON, C. J. The plaintiff, by his bill in equity, seeks first, specific performance by the defendants of a contract for a sale to the plaintiff of most of the property of the defendant corporation. The bill shows that, at the time the contract was to be performed, the defendants were ready and willing to perform it, but the plaintiff was not ready, and was unable to perform his part. Under such circumstances, specific performance ordinarily cannot be decreed, and never when time is of the essence of the contract. *Thaxter* v. *Sprague*, 159 Mass. 397. *Carter* v. *Phillips*, 144 Mass. 100. *Rice* v. *D'Arville*, 162 Mass. 559.

The original contract contains this sentence: "If the second party shall refuse or neglect to complete the purchase at the time hereinafter appointed, this deposit money shall be absolutely forfeited to the first party, and the trust company shall pay over the same to the first party and this agreement and all rights thereunder of the second party shall cease." It would be difficult to express more plainly the purpose of the parties to fix their respective rights finally by conditions existing at the time appointed.

There was good reason for making time an essential element of the contract. The agreement was not merely for a sale of land whose value would not be likely to change much in a short time, and whose transfer at a particular time, or continued ownership for a while longer would not be likely to be of much importance to the owner. It was a contract for the sale of substantially all the property of the corporation, which, according to the plaintiff's bill, owned and possessed ore rights, real estate, blast furnaces, iron raw, in process and manufactured, and which was then carrying on business, and had unfilled orders for the delivery of pig iron with about twenty-five different parties, amounting in the aggregate to eleven thousand four hundred and seven tons. The contract was made on August 27, 1902, and

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the sale was to be consummated on October 1, 1902, and afterwards, by an extension of the contract, on November 5, 1902, and the plaintiff was to assume and perform all of these contracts with third persons. It is manifest that, with reference to such property and under such circumstances, time would be likely to be of great importance to the parties.

Moreover, this is emphasized by the second contract, which is an agreement for the extension of the time. This is an assumption and acknowledgment by both parties that time was of the essence of the contract. In this the plaintiff agreed to give $2,500 in cash for an extension until November 5, 1902; that is, the sum of $2,500 which was to be applied as a part payment of the money consideration under the first agreement, was to belong to the defendants under the second agreement, and was not to be accounted for by them as a part of the cash payment. For this extension of time the plaintiff further agreed to put in the hands of the defendants two thousand shares of the stock of the company, which was to be in part payment if the contract was carried out, but was to be forfeited to the corporation in case the plaintiff was not "able duly to deliver the consideration and perform the agreement set forth in said agreement of August 27th on said November 5, 1902." We hardly see how parties could have expressed more plainly their intention and agreement that time should be of the essence of the contract. The plaintiff is not entitled to have specific performance of the contract, since the failure to perform it at the time appointed was due entirely to his own default. *Barnard* v. *Lee*, 97 Mass. 92, 94, and cases cited.

The plaintiff contends that he should recover from the defendants the money and stock, or a part of it, which he deposited under the contract, on the ground that the deposit was made as a provision for security, and not as liquidated damages. The question here is, What was the intention and meaning of the parties. If the fair interpretation of their agreement is that the money and stock should become the property of the defendant corporation as liquidated damages if the plaintiff failed to perform his contract, the plaintiff can have no relief in equity, but the contract will be held binding.

Much of what we have said on the other part of the case is

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equally applicable to this also. In the first agreement it is said that, in the event of non-performance by the plaintiff, not only shall the deposit money be absolutely forfeited to the first party, but that the "trust company shall pay over the same to the first party and this agreement and all rights thereunder of the second party shall cease." The second agreement treats this money as having become the absolute property of the defendant corporation by reason of the plaintiff's failure to perform. This is the interpretation put upon the original agreement by the plaintiff as well as the defendants. The language of the second agreement, as to the stock, is equally clear. In case of default by the plaintiff the "shares shall be regarded as forfeited absolutely to said Pennsylvania Furnace Company acting by its committee free and clear from all demand or equity of said Garcin or any person whatsoever." This shows that in such a case the plaintiff was not to have any equitable right in the property. There is no averment in the bill to show that such a contract would be unconscionable, or even improbable. The actual value of the stock is not stated, although its par value is $100 per share.

We discover nothing in either of the agreements, or in any of the averments of the bill, to justify us in treating the money and stock as held merely for the security of the corporation, and we think it plain that the parties intended them to be retained as liquidated damages. *Guerin* v. *Stacy*, 175 Mass. 595. *Garst* v. *Harris*, 177 Mass. 72, 74. *Keefe* v. *Fairfield*, 184 Mass. 334.

Demurrer sustained; bill dismissed.

CARRIE V. PAUL *vs.* FIDELITY AND CASUALTY COMPANY OF NEW YORK.

Suffolk. June 23, 1904. — September 8, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Insurance, Life. Limitation, By contract. *Equity Jurisdiction,* To relieve against forfeiture. *Waiver. Estoppel.*

A provision in a foreign insurance policy insuring against death by accident, that no action shall be brought on it unless begun within six months from the death

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of the insured, is binding on the beneficiary to whom the policy is payable, although she was prevented by an injunction issued after the six months had begun to run from bringing her action within the time limited, and she cannot maintain an action at law on the policy, especially where a final decree dissolved the injunction before the six months expired and there was a short but sufficient time in which an action could be brought. Whether equity would grant relief from the forfeiture incurred by the failure to bring an action within the time limited in the policy was not considered.

It is no excuse for a failure to sue on a policy, insuring against death by accident, within the time limited in the policy that the plaintiff did not know of that provision in the policy.

It is not the duty of a foreign insurance company insuring against death by accident to call the attention of the beneficiary of a policy, under which a liability has accrued, to a provision contained in it that an action on the policy must be begun within six months from the death of the insured, and the company does not waive the defence of a failure to comply with this limitation by its counsel taking part in interviews and making communications relating to the policy without referring to the limitation.

A foreign insurance company insuring against death by accident does not waive the defence of a limitation requiring an action on the policy to be brought within six months from the death of the insured, by refusing on another ground to pay the insurance money after the expiration of the six months, even if such a refusal before the expiration of the six months might estop it from setting up the limitation if the beneficiary was prejudiced or misled by the statement.

MORTON, J. This is an action of contract to recover the sum of $5,000 upon an accident policy issued by the defendant, a corporation organized under the laws of the State of New York, to one Charles F. Paul, who died May 29, 1902, as the result of accidental injuries received a few days previously. The policy is payable to Carrie V. Paul the plaintiff and the action is brought by a receiver in her name for his benefit. The case comes here on a report by the presiding justice after a refusal to rule as requested by the defendant that there was no evidence of waiver on its part of the terms of the policy, and a finding and judgment in favor of the plaintiff. If the ruling was right, the judgment is to be affirmed; otherwise, such judgment is to be entered as law and justice may require.

The policy provided amongst other things that proof of death should "be furnished to the company within two months from the time of death," and that "legal proceedings for recovery hereunder may not be brought till after three months from the date of filing proofs at the Company's Home Office, nor brought at all unless begun within six months from the time of death. . . . Claims not brought in accordance with the provisions of this

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paragraph will be forfeited to the company." The writ in this case is dated July 18, 1903. Due proof of the death of the insured was filed at the home office of the company in New York on July 7, 1902, and no question arises as to that. On the twenty-sixth day of June, 1902, Jennie I. Paul the widow of the insured filed a bill in equity in the Superior Court against the beneficiary named in the policy, the present plaintiff, alleging that the only interest which the beneficiary had in the policy was that of pledgee, and offering to pay what was due and to redeem the policy and praying for an injunction to restrain her from selling or assigning the policy, and from instituting or prosecuting any suit against the company or receiving any money payable under the policy. An injunction was issued as prayed for on the next day, June 27, and notice thereof sent to the defendant. On November 26, 1902, a final decree was entered in the equity suit in favor of the plaintiff in that suit, Jennie I. Paul. An appeal from this decree was taken on December 1, 1902, by the defendant, the present plaintiff, which was waived by agreement of the parties about a year afterwards, and a rescript was sent down from the full court ordering the decree to be affirmed. The proceedings in regard to the appeal do not seem to us to have any bearing on the questions now in issue. In April, 1903, on application of the widow, the plaintiff in the equity suit, two receivers were appointed in that suit to receive the money due on the policy. For some reason which does not appear they were not authorized to sue and collect what was due but only to receive what was due. Subsequently, also on application of the plaintiff in that suit, one of the receivers having resigned, full authority in the premises was granted to the remaining receiver, and on July 18, 1903, as already stated, this action was brought by him in the name of the beneficiary for his benefit.

The defence is that the action was not brought within the time limited in the policy. And it is clear that it was not. But the plaintiff contends that the injunction operated to excuse her from the effect of the limitation contained in the policy, and, if it did not, that the conduct of the defendant has been such as to warrant a finding that it has waived the provision, or is estopped to set it up. We do not think that either contention is well taken.

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Though this action is brought by the receiver in the name of the beneficiary, it is, in effect, prosecuted for the benefit of the widow. But it is manifest that neither she nor the receiver can stand in any better position than the party to whom by its terms the policy is made payable, except that, possibly, a waiver to the widow might enure to the benefit of the plaintiff. *Jennings* v. *Metropolitan Ins. Co.* 148 Mass. 61, 66. It is well settled that the limitation named in the policy is a good one, and is binding on the insured. *Lewis* v. *Metropolitan Ins. Co.* 180 Mass. 317. The plaintiff indeed does not contend that it is not.* As a general rule when the period of limitation prescribed by statute has begun to run, it will continue to run unless the case is brought within one or more of the exceptions provided by the statute. We do not see why the same rule should not apply to limitations by contract. *Wilson* v. *Ætna Ins. Co.* 27 Vt. 99. In some States the time during which an injunction is in force restraining the bringing of an action is excepted by statute from the time limited for the commencement of the action. Wood, Lim. Actions, § 243. There is no such statute in this State. Whether if there were it would apply to limitations by contract might admit of question. *Riddlesbarger* v. *Hartford Ins. Co.* 7 Wall. 386, 391. *Wilkinson* v. *First National Ins. Co.* 72 N. Y. 499. *Hamilton* v. *Royal Ins. Co.* 156 N. Y. 327. *Brown* v. *Roger Williams Ins. Co.* 7 R. I. 301. It is not necessary, however, to consider that question now, since neither the policy nor, as already observed, the statutes of this Commonwealth contain any exception or provision in regard to the effect of an injunction upon the limitation of actions. If there is no exception in the policy providing for such a case, and no provision in the statute, it is difficult to understand how an injunction, issued after the time limited in the policy had begun to run, can operate to prevent the limitation from taking effect, and it was so held in regard to a similar stipulation in a policy of insurance in *Wilkinson* v. *First National Ins. Co.*, *supra*. The plaintiff contends that what is said in that case in regard to the effect of an injunction upon the limitation named in the policy is *obiter* and that it has been modified if not overruled by the later decision in *Hamilton* v.

* R. L. c. 118, § 26, like the corresponding provision in Gen. Sts. c. 58, § 16, and Pub. Sts. c. 119, § 43, applies only to domestic insurance companies.

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Royal Ins. Co., ubi supra. But all that that case decided was that a statutory provision in regard to the commencement of actions operated to save an action begun in accordance with it from the effect of a limitation created by contract as well as a limitation created by statute. To that extent it may have modified or overruled the statement in the opinion in *Wilkinson* v. *First National Ins. Co.* that the provision in the statutes of New York saving the rights of parties stayed by injunction had no application where the limitation was prescribed by the contract of the parties. The general reasoning of the court in *Wilkinson* v. *First National Ins. Co.* as to the effect of an injunction upon a limitation by contract remains unaffected, we think, and seems to us more satisfactory than that in *Jackson* v. *Fidelity & Casualty Co. of New York*, 75 Fed. Rep. 359, where the decision was by a divided court, and in *Earnshaw* v. *Sun Mutual Aid Society*, 68 Md. 465, relied on by the plaintiff. In the latter case the court sought to apply to the case before it the principle laid down in *Semmes* v. *Hartford Ins. Co.* 13 Wall. 158, where the Supreme Court of the United States held that a provision similar to that which we are considering did not operate in case of war between the countries of the contracting parties. But it is manifest that the circumstances of that case were entirely different from the circumstances of this. Application could have been made to the court at any time by any of the parties interested for the appointment of a receiver and such a modification of the injunction as would allow him to bring suit on the policy, and the injunction would no doubt have been modified and a receiver appointed as was finally done. Moreover, the final decree in the equity suit was entered before the six months expired, and the time which elapsed between the date of its entry and the expiration of the six months, though short, was a sufficient time in which to bring suit. It is no excuse for the widow or the receiver to say that they did not know of the provision in relation to the bringing of an action. For aught that appears a copy of the policy could have been procured at any time. Furthermore, the plaintiff is chargeable with knowledge of the contents of the policy, and, as already observed, so far as the present suit is concerned, the receiver and the widow can stand in no better position than the plaintiff. Whether equity could or would

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afford relief from the forfeiture incurred by the failure to bring an action within the time limited in the policy, it is not necessary now to consider. We do not mean to intimate that it could or would. This is an action at law and the pleadings do not raise any question of equitable rights or relief, (*Isenburger* v. *Hotel Reynolds Co.* 177 Mass. 455,) and the principle invoked by the defendant, that when a court of equity by its interposition to prevent an act rightfully or wrongfully intended by the defendant, has deprived him of a remedy at law, it will give him a remedy equivalent to that which he has lost, is not applicable. *Brown* v. *Newall*, 2 Myl. & Cr. 558, 572. *Pulteney* v. *Warren*, 6 Ves. 73. *Wrixon* v. *Vize*, 3 Dru. & War. 104.

The plaintiff further contends that the defendant is estopped by its conduct to set up and rely upon the limitation contained in the policy, and that if it is not it has waived the right to do so. The grounds on which this contention is based are, in substance, that in various interviews and communications between counsel for the plaintiff and the widow and the receiver and counsel for the company in regard to the controversy which had arisen between the beneficiary and the widow, neither the company nor its counsel at any time called the attention of the plaintiff or the widow or the receiver or their counsel to the limitation contained in the policy or intimated that they should rely upon it, or refused to pay the amount claimed to be due, until May, 1903, and that the first notice that the plaintiff or the widow or the receiver or their counsel had, that the defendant intended to rely upon the limitation contained in the policy, was the filing of the answer. Especial reliance is placed upon the fact that on November 15, 1902, the defendant was informed by the attorney for Jennie I. Paul that the equity suit was to be tried on the following Monday, November 17, and that it must have known, as the plaintiff insists, that it was impossible to bring the case to an end before the limitation expired, which was November 29, but the defendant kept silent, and on the further fact that when the receiver made demand in May, 1903, the defendant refused to pay and further said that, under the decree appointing the receiver, the latter had no power to compel payment. But the defendant owed no duty and was under no obligation to the plaintiff, or to Jennie I. Paul, or to the receiver to

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call their attention or that of their counsel to the provision in the policy in regard to the limitation of actions. It had a right to assume that the parties were cognizant of it, and would pay due heed to it. It gave no assurances to any of the parties that it would not rely upon it, and it held out no inducements to them to delay. It was not a party to the equity suit, and the communication voluntarily made to it on November 15, 1902, that the equity suit was to be tried on the following Monday imposed on it no duty to inform him of the provision, or of its purpose to rely upon it, and in the absence of any such duty its silence cannot be construed as a waiver of the provision or as estopping it from relying upon it. What took place in May, 1903, was long after the time limited for the commencement of an action had expired. The fact that the defendant coupled with its refusal to pay an objection that the receiver could not compel payment cannot be regarded as a waiver of the limitation, or as estopping the defendant from taking advantage of it. It was none the less a refusal on whatever ground it was put. And even if we assume that it was put on the ground that the receiver had no power to compel payment, neither the plaintiff nor the receiver nor the widow were in any manner prejudiced or misled thereby, as might perhaps have been the case, if it had happened before the time for bringing the action had expired. See *Cook* v. *North British & Mercantile Ins. Co.* 181 Mass. 101, 104; *Rooney* v. *Maryland Casualty Co.* 184 Mass. 26.

We think that the ruling requested should have been given and that judgment should be entered for the defendant.

So ordered.

G. W. Buck, for the defendant.

F. T. Benner, S. H. Foster & F. Paul, for the plaintiff.

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MARY LEYLAND *vs.* HELEN M. LEYLAND.

Middlesex. January 26, 1904. — September 9, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

Practice, Civil, Motion to dismiss, Appeal. *Probate Court. Divorce*, Alimony. *Words*, "Person aggrieved."

A motion to dismiss an appeal from the Probate Court is a convenient and proper method of raising the question of the appellant's right to appeal.

Whether a woman who has obtained a decree of divorce and an execution for alimony, but has made no attachment and has not levied her execution, is a creditor of her former husband, *quære*. But, if she is a creditor, she is a creditor without a lien and as such is not a person aggrieved by a decree of the Probate Court allowing the final account of the guardian of her former husband, who was a minor, within the meaning of R. L. c. 162, § 9, giving a person who is aggrieved by a decree of a Probate Court the right of appeal to the Supreme Judicial Court.

LATHROP, J. This is an appeal from a decree of a single justice of this court, allowing a motion to dismiss an appeal from a decree of the Probate Court allowing a final account of a guardian. The grounds upon which the motion is asked are that the appellant is not a creditor of the estate, and that the appellant is not a party aggrieved by the decree of the Probate Court.

The facts as they are stated in the motion to dismiss are as follows: Mary Leyland was duly appointed guardian of Thomas W. Leyland on April 24, 1900, and filed a bond with a surety. On September 18, 1902, her ward became of age. On October 24, 1902, her first and final account, duly assented to by the ward after he became of age, was filed in the Probate Court. On December 23, 1902, Helen M. Leyland, claiming to be a creditor, made a motion to contest the account, which motion was denied on February 12, 1902, by a decree of that court.

Helen M. Leyland was the wife of the ward and she obtained a decree *nisi* from him in the Superior Court of Suffolk County on November 6, 1902, as of September 15, 1902, with alimony. No demand for payment of this alimony was made until after the ward became of age and the account was filed. There was no attachment or trustee process upon the guardian.

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The decree allowing the motion to dismiss states that the appellant is not a creditor of the estate nor a party aggrieved by the decree of the Probate Court; and recites that it was passed "after full hearing and consideration."

The appellant first contends that the single justice of this court had no right to hear and decide the case upon the motion to dismiss. But the practice followed in this case is familiar, and it is a convenient practice, where the question is as to the right of the appellant to appeal from the decree of the Probate Court. *Lawless* v. *Reagan*, 128 Mass. 592. *Dexter* v. *Codman*, 148 Mass. 421.

Whether the facts stated in the motion were true or not was to be determined, in the first instance, by the single justice of this court, and as no evidence is set forth, we cannot disturb his decree on any question of fact. The record shows that the decree was entered after a full hearing. The only questions open are those of law.

The contention of the appellant is that as she has a decree and execution for alimony she is a judgment creditor of the ward; and that she is therefore "a person who is aggrieved," within the meaning of these words in the R. L. c. 162, § 9.

It is obvious that if the appellant had no right to contest the settlement of the guardian's account, she is not a person aggrieved within the meaning of the statute; and this brings us to a consideration of the question what her rights were in this respect. She had a decree of divorce, and an execution for alimony, but she had not brought suit against the guardian, nor had she attached the ward's estate, nor levied her execution.

We find nothing in the R. L. c. 152, §§ 29, 31, cited by the appellant, which favors her contention. These relate to the powers of the Superior Court to enforce decrees for alimony.

As was said by Mr. Justice Gray, in *Audubon* v. *Shufeldt*, 181 U. S. 575, 577, "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time, as the circumstances of the

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parties may require. The decree of a court of one State, indeed, for the present payment of a definite sum of money as alimony, is a record which is entitled to full faith and credit in another State, and may therefore be there enforced by suit. *Barber* v. *Barber*, 21 How. 582. *Lynde* v. *Lynde*, 181 U. S. 183. But its obligation in that respect does not affect its nature. In other respects, alimony cannot ordinarily be enforced by action at law, but only by application to the court which granted it, and subject to the discretion of that court. Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings; and the considerations which affect either can be better weighed by the court having jurisdiction over the relation of husband and wife, than by a court of a different jurisdiction."

It was accordingly held in the case just cited that alimony, whether in arrear at the time of an adjudication in bankruptcy or accruing afterwards, was not a debt provable in bankruptcy, within the U. S. St. of July 1, 1898, c. 541. See also *In re Nowell*, 99 Fed. Rep. 931, 932.

So, in *Downs* v. *Flanders*, 150 Mass. 92, 94, it was said: "In libels for divorce, or petitions for separate maintenance, there is no final judgment which closes the proceeding as ordinary actions are terminated. The orders and decrees in reference to support, alimony, etc., remain open always to revision."

While a wife is not strictly a creditor, yet she may, on a libel for divorce for a cause occurring after marriage, attach the real and personal property of her husband to secure a suitable support and maintenance to her and such children as may be committed to her care and custody. R. L. c. 152, § 10. See *Burrows* v. *Purple*, 107 Mass. 428; *Downs* v. *Flanders*, 150 Mass. 92; *Place* v. *Washburn*, 163 Mass. 530.

So, it has been held that a conveyance of real estate by a husband after he has committed an act which entitles his wife to a decree for divorce, though before the libel is filed, is void, if made to prevent her from recovering such alimony as the court may decree to her. *Livermore* v. *Boutelle*, 11 Gray, 217. *Chase* v. *Chase*, 105 Mass. 385.

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If we assume that a wife having obtained a decree of divorce from her husband, and having also obtained an execution for alimony is a creditor, it does not follow that she is entitled to be heard, if her husband is a minor, on the settlement of his guardian's account, or that she is a party aggrieved and entitled to appeal.

In *Smith* v. *Bradstreet*, 16 Pick. 264, it was held that a creditor of an heir at law of a testator was not a person aggrieved and could not appeal from a decree of the Probate Court allowing the will. It subsequently appearing that the creditor had an attachment on the land at the time of the decree, it was held that he could appeal. The distinction is here clearly drawn between a creditor having a lien and one without one.

In *Henry* v. *Estey*, 13 Gray 336, it was held that a creditor of the estate of a deceased person could not appeal from a decree of the Probate Court, refusing the petition of the administrator for leave to sell the real estate of the deceased for the payment of debts.

In *Boynton* v. *Dyer*, 18 Pick. 1, it was held that the heirs presumptive of a person *non compos*, might appeal from the decree of the Probate Court allowing the account of the guardian of the person *non compos;* and the guardian was ordered to alter his account. In a note to this case, it is stated that the guardian of the *non compos* had also been the guardian of the heirs, and that one of them, after coming of age, had certified the account of the guardian as to his estate to be correct, had made a settlement with the guardian, and had given him a receipt in full of all demands. It was held that the appeal of this heir must be dismissed. 18 Pick. 8.

The appellant places much reliance upon the case of *Pierce* v. *Gould*, 143 Mass. 234. In that case the appellant was entitled to a share of a reversion of a fund under a will, and sought to contest the account of the executor of the will, and was allowed to do so. But that case is very different from the present. Here a mere creditor of a ward seeks to contest the account between the guardian and the ward. She has made no attachment and has not levied her execution.

The appellant also relies upon a remark made by the court in the case of *In re Hause*, 32 Minn. 155. But this remark is purely

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obiter, and probably is based on local laws differing from our own.

We are of opinion, therefore, that on the facts of this case, the decree of the single justice of this court must be affirmed.

So ordered.

J. B. Dixon, for the appellant.

J. T. Pugh, for the appellee.

JOSEPH B. MOORS & another *vs.* WILLIAM H. DRURY & another, assignees.

Middlesex. November 20, 1903. — September 13, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Sale. Insolvency. Banker.

Where a banker advances money to a merchant for the importation of goods on a letter of credit, under a contract by which the goods are consigned to the banker and he is to retain the title until he sells the goods in his own name, paying the surplus of the proceeds to the merchant after deducting the amount of his advances and commissions, duties and charges, the banker is the owner of the goods, and is not a mortgagee or pledgee within the meaning of Pub. Sts. c. 157, § 28, relating to the proof of a claim in insolvency by a creditor having a mortgage or pledge.

LATHROP, J. This is an appeal from a decree of the Court of Insolvency disallowing the claim of the plaintiffs against the estate of Fred A. Houdlette. The case was heard before the Chief Justice of the Superior Court, who refused to give certain rulings requested by the assignees in insolvency of Houdlette, and found for the plaintiffs. The assignees alleged exceptions.

The objection to the proof of claim is based upon the Pub. Sts. c. 157, § 28, which provides: "When a creditor has a mortgage or pledge of real or personal estate of the debtor, or a lien thereon, for securing the payment of a debt claimed by him, the property so held as security shall, if he requires it, be sold, and the proceeds applied towards the payment of his debt, and he shall be admitted as a creditor for the residue. The sale shall be made in such manner as the judge orders, and the

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creditor and assignee respectively shall execute all deeds and papers necessary or proper for effecting the conveyance. If the creditor does not require such sale and join in effecting the conveyance, he may release and deliver up to the assignee the premises held as security, and be admitted as a creditor for the whole of his debt. If the property is not so sold, or released and delivered up, the creditor shall not be allowed to prove any part of his debt."

It was admitted that the merchandise set forth on the credit side of the proof of claim had been sold without application to the Court of Insolvency.

It was agreed at the hearing that the report of the case of *Moors* v. *Reading*, 167 Mass. 322, and the report of the case of *Drury* v. *Moors*, 171 Mass. 252, might be referred to, and the facts therein stated be admitted as evidence of the facts in this case so far as they have any bearing on the issues herein.

In *Moors* v. *Reading*, it was held that under the facts stated the plaintiffs were not pledgees or mortgagees; and the same was held in *Drury* v. *Moors*. These cases are conclusive as to the part of the iron sold by the plaintiffs.

The other merchandise sold by the plaintiffs was imported under letters of credit issued to Houdlette by the plaintiffs under contracts in form like that stated in the bill of exceptions. This merchandise was consigned to the plaintiffs, who retained title to it until it was sold in their name. By the course of dealing between the plaintiffs and Houdlette, they paid to him the surplus of the proceeds, after deducting therefrom the amount of their advances, commissions, duties and custom-house brokers' charges.

We consider it well settled that under circumstances similar to those in this case a banker making advances and retaining the title, is the owner and not a mortgagee or pledgee. *Moors* v. *Wyman*, 146 Mass. 60. *Moors* v. *Kidder*, 106 N. Y. 32. *New Haven Wire Co. Cases*, 57 Conn. 352. *Mershon* v. *Moors*, 76 Wis. 502.

We are of opinion, therefore, that in neither of the classes of merchandise in question the statute applies. While it is true in regard to the imported merchandise that in the letter signed by F. A. Houdlette & Co. the latter says that the goods may be held "as general collateral security for our account with you," this could not affect the ownership of the plaintiffs in the goods,

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or their right to sell them as owners. This subject is so fully discussed in the cases last above cited that we do not deem further discussion necessary.

The remaining question relates to small items of stock in a corporation, and certain notes. These were taken by the plaintiffs in payment for some of the imported iron. The plaintiffs were therefore the owners of the stock and notes.

Exceptions overruled.

W. R. Sears, (*A. Lincoln* with him,) for the assignees.

R. M. Morse, (*J. Duff* with him,) for the plaintiffs.

WILLIAM L. GEORGE, receiver, *vs.* ALBE C. CLARK & another, trustees.

Suffolk. June 23, 1904. — September 14, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & LORING, JJ.

Absentee. Receiver, Of property of absentee. *Evidence*, Presumptions and burden of proof.

On a petition under R. L. c. 144, for the appointment of a receiver of the property of an absentee, whose whereabouts were unknown, it appeared, that if the absentee was alive, he would be entitled to share in certain property under the will of his father, that when his father's will was made he had been absent and unheard from for more than seven years, and that by the terms of the will his right to share in the income of a certain fund depended on his existence when from time to time the income was to be divided. *Held*, that, as no part of the property belonged to the absentee at the time of his disappearance, and as the presumption from his unexplained absence was that he never was alive at any time afterwards, the evidence failed to show that any part of the income ever belonged to the absentee, so that there was no occasion for the appointment of a receiver under the statute.

The unexplained absence of a person unheard from for seven years raises a presumption of his death.

There is no presumption that an absentee unheard from for more than seven years who was unmarried when he disappeared ever had issue.

HAMMOND, J. This is a petition brought under R. L. c. 144, for the appointment of a receiver of the property of George S. Smith, who, on October 23, 1873, being then, as the petition alleges, twenty-eight years of age, left his home in this State

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and has never since been heard from although diligent search has been made to find him. It does not appear that he ever was married. The case is before us upon an appeal from a decree of the Probate Court appointing a receiver, reserved for our determination by a single justice of this court.

All of the property named in the petition is the accumulated income of one fourth of the trust estate mentioned in the sixth and seventh items of the will of George W. Smith, who was the father of the absentee; and the appellants, who are the present trustees, contend that it does not appear that the absentee ever had any interest in this income.

When George W. Smith made his will he was uncertain whether his son George, who then had been absent more than seven years, was living, yet he contemplated the possibility that the son might be alive and might return to this State; and the will was framed with a view to that contingency. In the second item a bequest was made to the son conditioned upon his return before the decease of his mother; and the sixth item provided that after the death of the mother the net income of the trust fund created by the will, so long as any one of the four children including George should live, should be divided semi-annually, or oftener if convenient, "into as many equal shares as shall be equal to the number of all my said children, excepting such as shall have deceased without issue, or deceased leaving issue which has become extinct at the time of making such division"; and so on to the end of the trust. The seventh item provided that upon the death of the last survivor of the children the principal of the trust fund should be divided equally among the grandchildren then living, any issue then living of a deceased grandchild to take the share which the deceased grandchild, if alive, would have had. It was further provided, however, that if, "at the time of the decease of all my said children, excepting my said son George, neither he nor any child of his shall be known to my said trustees to be living," then the residue was to be divided among the then living grandchildren, "excluding my said son George S. Smith, and his children if any."

It will be noted that while the right of George to the bequest in the second item, and to a share in the principal under the seventh item, was conditioned not simply upon his existence,

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but also, as to the first bequest, upon his returning and demanding the same before the death of his mother, and as to the second, upon his existence being made known to the trustees, his right to a share in the income under the sixth item depended simply upon his existence when from time to time the income was to be divided. If then alive he was entitled to it, otherwise not.

The father died in January, 1887, his will was duly admitted to probate, and the appellants were appointed executors and trustees. The widow died in April, 1893. Upon her death the executors and trustees were in a quandary as to two matters. The son George had not appeared to claim the bequest made to him in the second item, but they wanted that fact judicially established before carrying the amount to the general trust fund. The chief trouble however respected the distribution of the income under the sixth item. If George was alive, one fourth at least was to go to him, or, if he died leaving issue, then to such issue if then living. But if neither he nor any of his issue were alive, then that part of the income to which he or his issue, if living, would have been entitled was to go to the other beneficiaries. While his unexplained absence for seven years might raise a presumption of his death, and while there was no presumption that he ever had issue, (*Loring* v. *Steineman*, 1 Met. 204, 211,) yet the right of George or his issue to this income depended upon what was the fact as to their existence and not upon the state of the evidence by presumption or otherwise as to this fact. The embarrassment of the trustees arose not from any uncertainty as to the meaning of the language in the will, but from an ignorance as to what the facts were. If these facts could be made known or judicially established as to all parties interested, then the duty of the trustees was clear.

In this state of things the executors and trustees in August, 1895, brought the petition for instructions which ended in the decree of November 20, 1896. By reference to the papers in that case it appears that the petitioners sought for instructions as to the two matters above specified. No service other than by publication was made upon George, but a guardian *ad litem* was appointed to represent him and his issue. The questions were, first, whether the sum conditionally bequeathed to George in the

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second item of the will should be paid over to the trust fund for the reason that George had not appeared and claimed it before the death of his mother, and, second, whether one fourth of the income should be set apart for George and his issue until some time in the future or whether it should be distributed like the other three fourths among the other beneficiaries.

By the decree it was established that George had not complied with the conditions of the bequest to him in the second item, and the sum was to be added to the general trust. As to the income, one fourth part was to be set apart and deposited in a proper banking institution for George "until he is heard from, or until the death of the last survivor of the other three children, or until made distributable by law."

We do not think that the effect of this decree was to adjudicate as between the parties the question whether George or any of his issue (if any he ever had) were living, or ever would be entitled to this share of the income, but that it was simply to provide provisionally for the safe keeping of this part of the income so that, if any one of them should thereafter be found to be living and entitled to any part of it, his right would be protected. Such being the effect of the decree, in the consideration of the petition before us we are left to the general principles of law upon the question whether it appears that any part of this income ever belonged to George. It is to be noted that the petition asks for a receiver over his property and not over that of his issue.

Under the circumstances, the presumption is that George died before his father, and that he never became entitled to any of this income. That presumption is not controlled or indeed in any way affected by the decree. At the time of his disappearance no part of this property belonged to him; and the presumption from his unexplained absence is that it never belonged to him at any time afterwards.

Inasmuch as the evidence fails to show that any part of the income ever belonged to him, the statute is not applicable. The property must be held in accordance with the decree of November 20, 1896, so far as respects this petition.

Petition dismissed.

W. L. George, receiver, *pro se.*
L. M. Clark, for the trustees.

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DANIEL W. CLARK, administrator, *vs.* STELLA C. SEAGRAVES, administratrix.

Middlesex. December 8, 1903. — September 15, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Equity Jurisdiction, To redeem property conveyed as security by absolute deed, Survival of right to relief. *Equity Pleading and Practice*, Master's report, Decree. *Executor and Administrator. Survival. Interest. Words*, "Mortgaged estate", "Equity of redemption."

In a suit in equity to redeem the plaintiff's interest in real and personal property held by the defendant under a deed absolute in form, the plaintiff can show that the deed was given as security for a debt due to a third person, the defendant's fraud in claiming an absolute title being the same whether the debt secured is due to the grantee or to another.

An intestate, owning real and personal property, left at his death a son and a daughter, who were appointed to administer his estate. The son made conveyances absolute in form to his sister of his interest in the personal estate and in certain real estate of their father, and died. The administrator of the son's estate brought a bill in equity against the sister, as surviving administratrix of the estate of the father and also individually, alleging that the conveyances had been made merely as security for certain indebtedness of the plaintiff's intestate to his father's estate, and seeking to redeem. The defendant contended that the conveyances were made by her brother to her individually for her own benefit in the settlement of their father's estate. *Held*, that the plaintiff could maintain his bill without waiting for the Probate Court to decide whether the property belonged to the defendant individually or as administratrix, and that the fact, that all persons interested in the father's estate except creditors were parties to the suit and therefore the determination of the issues as to the personal property might be *res judicata* when the same questions afterwards were raised in the Probate Court, was accidental and immaterial.

In a suit in equity for an accounting against an administratrix and against the same defendant individually, the defendant excepted to the refusal of a master to find that the suit could not be maintained because it was not apparent from the bill whether the plaintiff sought an accounting from the defendant in her individual or her representative capacity. *Held*, that such an exception does not lie, as it is the duty of a master to find the facts and not to pass on the question whether on those facts the plaintiff is entitled to a decree, still less to decide what such decree should be.

By R. L. c. 187, § 33, a suit, to redeem land from a deed absolute on its face but in fact given as security, can be maintained by the administrator of the estate of the grantor. In the phrase "If the owner of an equity of redemption dies" the words "owner of an equity of redemption" in the present statute, as well as the words "person, entitled to redeem any mortgaged estate" in the original act, include the grantor of an absolute deed intended as a mortgage.

A right to equitable relief founded on the failure of a person to perform duties arising from a fiduciary relation survives to an executor or administrator. The

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right to redeem property held under a deed absolute in form but intended as a mortgage is of this class.

Under R. L. c. 187, § 33, a suit, to redeem land from a deed absolute on its face but in fact given as a mortgage, can be maintained by the administrator of the estate of the grantor without the plaintiff first obtaining a license to sell real estate.

Where a suit is brought by an administrator under R. L. c. 187, § 33, to redeem land conveyed by his intestate by a deed absolute on its face but in fact given as a mortgage, if the plaintiff has obtained no license to sell, a decree in his favor enures to the benefit of the widow and heirs of the intestate, and the defendant must be ordered to make a conveyance to the heirs, subject to the right of the widow to dower if a right of dower exists.

This court will entertain a bill under R. L. c. 187, § 33, to redeem land in another State from a deed absolute in form but intended as a mortgage, especially where the deed was made in this Commonwealth by one Massachusetts citizen to another. In such a suit by an administrator, if the plaintiff prevails, the defendant must be ordered to convey the land to those persons who are the heirs of the plaintiff's intestate by the laws of the State in which the land is situated, subject to rights of dower if existing.

One owning real and personal estate died intestate leaving a son and daughter. The son conveyed to his sister his interest in the personal estate and in certain real estate of their father to secure an indebtedness of the son to the estate of the father. The son died. His administrator brought a suit in equity against the daughter as administratrix of the father's estate and also individually, to redeem the son's interest in the property on payment of his indebtedness to the estate. *Held*, that although the conveyances of the son were in form to the defendant individually they were made for the benefit of the father's estate, and were assets of the estate for which it was the defendant's duty to account as administratrix; that the rents and profits of the real estate, which the plaintiff was entitled to redeem, which accrued before the death of the plaintiff's intestate, belonged to the plaintiff as administrator, and that the rents and profits after the death of the plaintiff's intestate belonged to the heirs of the intestate, but that as the administrator was redeeming in their interest he might deduct such rents and profits in paying the debt of the intestate to redeem the property; and that, as the personal property to be redeemed was the son's interest in the personal property of his father's estate, and as the plaintiff in order to redeem must pay his debt with interest so that the father's estate might be settled, the plaintiff in no event would be entitled to a credit by way of income derived from the personal property before such settlement.

Although an equitable mortgagor who redeems must pay the whole debt, yet in a suit to redeem property transferred as security by several conveyances, if each conveyance was a separate transaction, the plaintiff has a right to redeem the property transferred by each conveyance on paying the debt which it was given to secure.

In a suit to redeem from an equitable mortgage consisting of several conveyances absolute in form, the plaintiff to redeem must pay interest on the debt secured by each conveyance from the date when such conveyance was made and not merely from the date of filing his bill.

THE following statement of the case is taken from the opinion of the court:

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On February 10, 1894, Edward Clark died leaving a son, Edward Payson Clark, the plaintiff's intestate, and a daughter, Stella Clark, now Stella Clark Seagraves, the defendant. The son and daughter were appointed to administer their father's estate. The son died February 14, 1895. This suit in equity was brought on October 1, 1898, in the Superior Court by the administrator of the son's estate against the daughter as administratrix of the father's estate, to redeem the son's interest in and to the personal estate of the father, also his interest in two lots of land in Uxbridge and "in certain real estate situated in the State of Ohio," assigned and conveyed by the son to the daughter in 1894, on the ground that the assignment and conveyances were made for the purpose of securing what was due from the son to the estate of the father. In the original answer filed by Mrs. Seagraves as administatrix, it was alleged that the three conveyances were of real and personal property to which the son was entitled "as heir at law" of their father, and were made in settlement of the estate of the father and not as collateral security for a debt or debts due from the plaintiff's intestate to the estate. The case was sent to a master, who made a report in favor of the plaintiff. The bill then was amended by making Mrs. Seagraves a defendant in her individual capacity, and the suit was recommitted to the master, who again reported in favor of the plaintiff. To both reports the defendant took exceptions, all of which were overruled by the Superior Court. The defendant appealed.

The following are those exceptions to the master's amended report which are referred to in the opinion, printed in the order in which they are mentioned:

"Second: Because the master does not find that the instruments of conveyance and grant made by the plaintiff's intestate to the defendant, individually, being under seal, no oral agreement can be considered to establish the proposition that any person, other than the grantor and grantee therein named, were parties to such conveyance, or that any trust to any third person could thereby be created or exist.

"Third: Because the master does not consequently find that the instruments of conveyance must be taken to be as absolute and conclusive grants and conveyances.

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"Fourth: Because, if the master's finding means that, as a matter of law, the consideration paid for such conveyances was so paid by the estate of Edward Clark, and that thereby the property conveyed was held by the grantee upon an implied trust for the estate of said Edward Clark, then, as a matter of law, he should have found that the estate so conveyed was, in law and equity, assets of said Clark estate and must be dealt with as such, and that, upon such findings of law and fact the plaintiff's bill cannot be maintained, for there is an adequate and exclusive remedy in the Probate Court in the premises.

"Fifth: Because the master does not find that the bill cannot be maintained and no decree entered for the plaintiff, for that the prayers of the plaintiff's bill are for an accounting between the plaintiff and the defendant, and it appearing that, by amendment, there are two defendants named, it does not appear with which the plaintiff demands an accounting, and that therefore no decree can be made."

"Twelfth: Because the master finds that the plaintiff is entitled to redeem a portion of the property conveyed by the three conveyances set forth in the plaintiff's bill as made by the said plaintiff's intestate to the said defendant."

"Twenty-first: Because the master finds that the plaintiff is entitled to redeem any portion of the property conveyed by his intestate to said defendant by paying a part only of the indebtedness found to be due from said intestate to his father's estate."

"Twentieth: Because the master does not find that the plaintiff should pay a proper and lawful amount of interest on the different items of indebtedness he finds to have been subsisting from the plaintiff's said intestate to the estate of his father, Edward Clark."

H. Parker, F. N. Thayer & G. A. Gaskill, for the defendant.

H. P. Harriman, H. E. Perkins & J. F. Neal, for the plaintiff.

LORING, J. [After the above statement of the case.] The first objection argued by the defendant is that although a conveyance which is absolute in form can be shown to have been given as security for a debt due to the grantee, it cannot be shown to have been intended as security for a debt due to a third person. The ground on which the grantor of an absolute

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deed of real estate can go into equity and show that it was in fact given to secure a debt, is fraud. See *Campbell* v. *Dearborn*, 109 Mass. 130, particularly pp. 137 and 142. See also *Hassam* v. *Barrett*, 115 Mass. 256. It is as much a fraud to take and insist upon the benefit of an absolute conveyance which was intended to secure a debt due to another as to take and insist upon it when it was intended to secure a debt due to the grantee. The doctrine of *Campbell* v. *Dearborn*, 109 Mass. 130, is as applicable in the one case as in the other. We are of opinion that this point is not well taken.

Her next contention is that inasmuch as the defendant in her individual capacity contended that these deeds were her separate property, no bill which in effect is a bill to redeem them can be maintained until it is ascertained that they belong to the estate and not to her individually; that the issue whether these deeds were her separate property or are assets of her father's estate is an issue within the exclusive jurisdiction of the Probate Court, and until it has been disposed of there, and a conveyance has been made by the defendant individually to herself as administratrix, the bill cannot be maintained. This bill is brought by the plaintiff as a debtor of the estate of Edward Clark. Had such a bill been brought by a stranger to the estate who had mortgaged his property to a third person to secure a debt due to the estate, it is plain that there would be nothing in this contention. A stranger could allege in his bill that the absolute conveyance was in fact given as security, and that for the purpose of proving that issue he has joined the grantee named in the deed. He also could allege that the debt for which it was given as security was a debt due to the estate and not due to the grantee. If the administrator disclaimed such a debt being due to the estate, that would relieve the plaintiff. If the administrator claimed the debt, the plaintiff could redeem on paying it. In the case at bar, the plaintiff having made the administratrix a party defendant in her individual capacity can try the question whether the conveyances were in fact intended as collateral security or were made for her separate benefit, and, having made her a party defendant in her representative capacity as administratrix, he can try the question of the amount due and obtain a decree allowing him to redeem. The fact that one of the things

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conveyed was personal property coming to the plaintiff's intestate as one of the two persons interested in the estate, and the fact that all persons interested in the estate except creditors are parties to this proceeding and for that reason the issues which would naturally arise in the Probate Court may be held to be *res judicata* so far as the personal property is concerned, if they are raised there after this suit is concluded here, is accidental and immaterial. The contentions set forth in the second, third and fourth exceptions to the amended report were not well taken.

The next contention argued is that the allegations of the bill originally were made with respect to the defendant in her official capacity, and were not repeated as to the defendant individually when, by an amendment to the bill, she was joined as a party defendant in that capacity. This contention is made principally in support of the fifth exception. That is an exception to the refusal of the master to find that the bill cannot be maintained because the prayer is for an accounting and it is not apparent from the bill whether the plaintiff seeks an accounting from the defendant in her individual or her representative capacity. The only question before the master was whether evidence on these allegations was admissible. It is plain that it was. It is the duty of the master to find the facts. The master is not required to pass on the question whether on those facts the plaintiff is entitled to a decree, much less to what decree he is entitled.

The next question argued by the defendant is the ruling as to an accounting. It will be more convenient to discuss this after disposing of the defendant's next contention, to wit, that inasmuch as it is not pretended that the plaintiff has a license to sell the real estate of his intestate Edward Payson Clark, the grantor in the conveyances in question, the bill cannot be maintained.

The exception of the defendant and the argument made in support of it seem to overlook the fact that one of the three conveyances is an assignment of "all his [the son's] right, title and interest in and to any personal property or estate of any and every name and nature to which he might be entitled as one of the heirs of" the father. To that extent the exception

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is not well taken. One of these deeds of land conveyed all the son's "right, title and interest in and to two certain tracts of land situated in said Uxbridge," to wit, Uxbridge in this Commonwealth.

The question is here presented whether a bill to redeem land from a deed which is absolute on its face but in fact was given as security, can be maintained after the death of the grantor by the administrator of his estate.

It is not pretended that at common law an administrator can bring a bill to redeem real estate which was conveyed in mortgage by the intestate. The equity of redemption is now an estate in land recognized at law as well as in equity, and an estate which descends to the heir. The right to redeem is at common law in the heir. The commissioners who were appointed to revise the statutes before the Revised Statutes of 1836 were enacted, reported two sections changing the law in this respect. Commissioners' Report, Rev. Sts. c. 107, §§ 27, 28. Their reasons for the change are stated in the note to these sections to be: "The right to make the tender, and to commence and prosecute the suit, is proposed to be given to the executors or administrators, as well as to the heirs or devisees. It may be sometimes convenient that an executor or administrator should redeem, for the benefit of minor heirs, widows, or others who cannot act for themselves; and if the land will probably be wanted to pay the debts of the deceased, there may be no one interested to redeem, unless it is the executor or administrator for the benefit of the creditors." The sections thus proposed became Rev. Sts. c. 107, §§ 30, 31, and were re-enacted in Gen. Sts. c. 140, §§ 32, 33; Pub. Sts. c. 181, §§ 39, 40; and R. L. c. 187, § 33.

The provisions of R. L. c. 187, § 33, are that "if the owner of an equity of redemption dies," the administrator may redeem. The grantor of an estate by an absolute deed in fact given as security is not perhaps "the owner of an equity of redemption" in the strict technical sense of the word. Technically speaking, it cannot be said that in case of such a deed any estate is left in the grantor, and the words of the statute imply that the person whose administrator is entitled to redeem under the statute must have an estate. The language of the original act, however, is:

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"any person, entitled to redeem" in place of "the owner of an equity of redemption", language which can more easily be construed to include a grantor of an absolute deed intended as security who has a right to redeem on the ground of fraud. The change in phraseology was made by the commissioners for the Revised Laws, and was made without comment on their part. Moreover where such a grantor dies there is the same reason for giving the administrator the right to act for all interested in the estate as there is where the owner of an equity of redemption dies. For these reasons we are of opinion that the words "any person, entitled to redeem any mortgaged estate" in the original act and the words "the owner of an equity of redemption" in the present act are to be construed to include the grantor of an absolute deed intended as a mortgage.

There remains the question whether at common law the right to redeem on the doctrine of *Campbell* v. *Dearborn* survives or whether that case comes within *Leggate* v. *Moulton*, 115 Mass. 552, and *In re Duncan*, [1899] 1 Ch. 387. We are of opinion that this right of action survives on the ground that the defendant has property in his hands as distinguished from a liability to respond in damages; and for that reason the case comes within *Phillips* v. *Homfray*, 24 Ch. D. 439, cited with approval in *Warren* v. *Para Rubber Shoe Co.* 166 Mass. 97, 104, and in *Houghton* v. *Butler*, 166 Mass. 547, 548, (see also *Finlay* v. *Chirney*, 20 Q. B. D. 494,) and not within *Leggate* v. *Moulton*, 115 Mass. 552, and *In re Duncan*, [1899] 1 Ch. 387. And also that this right of action survives to the heir, (see in this connection *Jones* v. *Simes*, 43 Ch. D. 607,) and not to the administrator, as seems to have been conceded by counsel in *Cheney* v. *Gleason*, 125 Mass. 166, while the contrary seems to have been assumed in *Parker* v. *Simpson*, 180 Mass. 334.

The defendant's next contention is not well taken. The administrator is entitled to redeem without taking out a license to sell the real estate. In *Mason* v. *Daly*, 117 Mass. 403, a license to sell the real estate was granted to the administrator, and that fact is stated in the opinion. But there is nothing in the act requiring this to be done, and the note of the commissioners makes it plain that they intended to give the administrator the power to redeem where no license to sell is

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granted. In *Long* v. *Richards*, 170 Mass. 120, such a bill was maintained although no license to sell had been taken out. We are of opinion that such a bill may be maintained under the statute by the administrator without license to sell having been obtained.

Where a bill to redeem is brought by an administrator under R. L. c. 187, § 38, the result enures exclusively to the benefit of the widow and heirs, in case no license to sell the real estate to pay debts has been granted to him. *Aiken* v. *Morse*, 104 Mass. 277. It was not intended by R. L. c. 187, § 38, to make a change in the rights of the persons interested, but to afford a remedy where many were interested and where some of them were likely to be persons who could not act for themselves. It does not deprive the heir or the widow of their rights to redeem. For these reasons the conveyance of the real estate to be made by the defendant should be to the heirs subject to the right of the widow to dower, if she has a right of dower.

The next question which arises is whether this court will entertain this bill so far as it seeks relief in respect of the land in Ohio. We are of opinion that such a bill is within the jurisdiction of a Massachusetts court, particularly as the deed was made in Massachusetts by a Massachusetts citizen to a Massachusetts citizen. However it may be as to bills to redeem or foreclose a mortgage as to which the authorities are not uniform, (on the one side see Kent, Ch. in *Kershaw* v. *Thompson*, 4 Johns. Ch. 609, 616, and *Muller* v. *Dows*, 94 U. S. 444, 448, 449, the doctrine of which case has not extended,—see *Huguley Manuf. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290, 294,—and on the other side see *Kanawha Coal Co.* v. *Kanawha & Ohio Coal Co.* 7 Blatch. 391, 415, *Paget* v. *Ede*, L. R. 18 Eq. 118,) a bill which is based on the doctrine of *Campbell* v. *Dearborn* is a bill for relief against fraud, not a bill dealing with the title to an estate in land. The fact that the fraud consists in the conveyance of real estate is no more material in such a suit than is the fact that the thing stipulated for is the conveyance of land in a foreign jurisdiction when specific performance of such a contract is sought here. The case comes within *Reed* v. *Reed*, 75 Maine, 264; *Cranstown* v. *Johnston*, 3 Ves. 170; *S. C.* 5 Ves. 277. See also *Mercantile Investment & General Trust Co.* v. *River*

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Plate Trust, Loan & Agency Co. [1892] 2 Ch. 303. The jurisdiction in case of a bill to enforce specific performance of a contract to convey land in a foreign country is established. See *Pingree* v. *Coffin*, 12 Gray, 288; *Davis* v. *Parker*, 14 Allen, 94; *Penn* v. *Baltimore*, 1 Ves. Sen. 444; *Tulloch* v. *Hartley*, 1 Y. & C. Ch. 114. See also the cases collected in Dicey, Conflict of Laws, 218, 219.

We are of opinion that R. L. c. 187, § 33, applies to a bill to redeem on the doctrine of *Campbell* v. *Dearborn*, where the land is situated in a foreign country, and that the conveyance is to be made to those persons who are the heirs of the land by the laws of Ohio, where the intestate died, subject to the rights of dower, if any.

The next matter which has to be dealt with is in which capacity the defendant is to account for rents and profits and which has been referred to above. It has been found that although the assignment and conveyances here in question run to the defendant individually they were made in fact for the benefit of the estate. That means that they were assets of the estate for which it is her duty to account as administratrix. The rents and profits which accrued before the death of the intestate Edward Payson Clark were personal property when he died, and belong to the administrator. The rents and profits after the death of the intestate belong to the heirs, but since the administrator is redeeming in their interest he may deduct them in paying the amount which has to be paid to redeem.

Inasmuch as the personal property assigned was the son's interest in his father's estate and the debt for which that interest in the estate was assigned is a debt due to that estate, the plaintiff will not be entitled to a credit by way of income on that property in any event. To clear the estate and the security the plaintiff must pay his debt with interest, so that the estate can be settled.

The twelfth and twenty-first exceptions to the amended report are not well taken. Although the defendant is correct in her contention that a mortgagor who redeems must pay the whole debt, in this case the master has found that each conveyance was a separate transaction. The plaintiff therefore had in effect a right to redeem each conveyance on paying the debt which it was given to secure.

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We are of opinion that the twentieth exception must be sustained. The master found that the debt secured by the assignment of the son's interest in the personal estate of his father was barred by the statute of limitations, but that the statute was waived by him, and that the amount due at the date of the assignment was $4,000. In the absence of a further finding, the plaintiff to redeem must pay the interest due on the debt which is found by the master to be due from the date of the assignment. The same is true as to the conveyances of the land in Uxbridge and in Ohio. In neither instance is it enough that he pay interest from the date of bringing the bill to redeem. The decree should be drawn accordingly.

The defence which was successful in *Hassam* v. *Barrett*, 115 Mass. 256, does not appear to have been taken in the case at bar.

Decree accordingly.

HARLOW H. ROGERS *vs.* NATHAN NICHOLS.

Middlesex. December 17, 1903. — October 17, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Equity Jurisdiction, To prevent clouding of title. *Constitutional Law*, Vested rights. *Tax*, Sale, redemption.

A landowner may maintain a suit in equity to prevent a threatened clouding of his title not yet accomplished.

St. 1902, c. 443, giving the right to redeem land sold for taxes by paying the taxes to the collector instead of to the purchaser, is constitutional as applying to sales for non-payment of taxes assessed before its enactment.

Where the remedy for redemption of land from a tax sale has been enlarged by statute between the time of the assessment of the tax and the time of the sale, a purchaser at the sale takes his title subject to the law in regard to redemption as it stands at the time of the sale and not as it stood at the time of the assessment.

BILL IN EQUITY, filed August 27, 1903, to enjoin the collector of taxes of the city of Everett from receiving any money from one Annie C. Bartlett under St. 1902, c. 443, in redemption of certain land sold for taxes or giving her any certificate of such payment.

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The Superior Court made a decree dismissing the bill; and the plaintiff appealed.

F. Rogers & C. C. Long, for the plaintiff.

No counsel appeared for the defendant.

BRALEY, J. Between May 1, 1901, the date when the tax was assessed on the estate described in the bill, and June 8, 1903, the date of sale to the plaintiff, the statutory provisions relating to the redemption of lands sold for the payment of taxes had been changed. St. 1888, c. 390, §§ 57, 58, 59, subsequently R. L. c. 13, §§ 58, 60, 61. St. 1902, c. 443.

The plaintiff seeks to have this last statute, which wrought this change, declared unconstitutional. It provided that the person entitled to redeem from a tax sale might make the requisite tender for redemption to the collector of taxes, who should then give a certificate "specifying the amount paid, the name of the person to whom and the real estate on which the tax was originally assessed, and the registry of deeds and the book and page of the records therein where the collector's deed is recorded." And upon the recording of this certificate in the proper registry, all right and title of the purchaser under the collector's deed became extinguished.

If the statute is declared void, then the right to redeem could be exercised only under R. L. c. 13, § 58, by making the required tender to the "purchaser, or his legal representatives or assigns", and as the bill alleges that the former owner seeks to redeem from the collector, and accordingly has made application to him for a certificate which when recorded would constitute a cloud on the title of the plaintiff, he would not be compelled to wait until this certificate was actually procured and placed on record before bringing suit, as such a bill can be maintained to prevent clouding, as well as to remove a cloud from title to real estate. *Stevens* v. *Mulligan*, 167 Mass. 84, 86. *Loring* v. *Hildreth*, 170 Mass. 328, 331. *White* v. *Gove*, 183 Mass. 333, 339.

But the statute must be deemed constitutional.

By St. 1848, c. 166, §§ 6, 7 and 8, it was first provided that where a purchaser of lands sold for payment of taxes, or any agent duly appointed by him, could not be found, upon reasonable search, the person entitled to redeem might pay the amount required for redemption to the town or city treasurer, who should

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give a certificate showing the fact of payment and designating the land on which the tax was assessed. Upon filing this certificate in the registry of deeds where the lands lay, together with an affidavit of himself or some disinterested person, that upon reasonable search neither the owner nor his agent could be found, and which is given the force of *prima facie* evidence as to the facts recited therein, all right and title acquired under the collector's deed was released and discharged.

These provisions for redemption finally became by re-enactments R. L. c. 18, §§ 60, 61. See Gen. Sts. c. 12, §§ 37, 38; Pub. Sts. c. 12, §§ 50, 51; St. 1888, c. 390, §§ 58, 59.

The purpose of the statute under discussion was to supersede these two sections of the Revised Laws, and extend this method of redemption to all cases, whether the purchaser at a tax sale could or could not be found, and the affidavit prescribed by the earlier statute became unnecessary and was no longer required; while the collector of taxes instead of the treasurer of the city or town was substituted as the person to whom tender could be made.

Although the lien which attaches to real estate upon a proper assessment of taxes thereon is commensurate with the extent of the title at the time, and may so continue until a sale is made, the right to redeem therefrom is not dependent upon the nature or extent of this lien, but is a separate provision granted by the State for the benefit of those who may have been thus deprived of their property. It is within the power of the Legislature, after an assessment has been made and before the sale, to prescribe the conditions under which redemption may be had if the premises taxed are sold, and acts of this character are not considered unconstitutional as impairing any vested or contractual rights that might be acquired by a purchaser.

As the plaintiff took his title subject to the law relating to redemption of lands from tax sales, as it stood at the time of sale, and not at the time of assessment, he cannot successfully maintain that his rights to property have been impaired by any statutory change made since his purchase. *Merrill* v. *Dearing*, 32 Minn. 479, 481. *Kipp* v. *Johnson*, 73 Minn. 34, 35. *Cole* v. *Lamm*, 81 Minn. 463. *Negus* v. *Yancey*, 22 Iowa, 57. *Wolfeborough Savings Bank, petitioner*, 69 N. H. 84. *Dubois* v. *Hep-*

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burn, 10 Pet. 1, 22. Nor can his argument prevail that the amendatory act, because it enlarged the remedy given for redemption, must be declared void.

Where the right of redemption exists it has always been provided that tender could be made to the purchaser, though this has been extended to include those who represent him or succeed to his title. St. 1785, c. 70, § 7. Rev. Sts. c. 8, § 32. R. L. c. 18, § 58.

And by including the collector of taxes, the additional remedy furnished was cumulative and did not affect the right itself. *Geer* v. *Horton*, 159 Mass. 259, 261. *Clark* v. *Lancy*, 178 Mass. 460. *Barry* v. *Lancy*, 179 Mass. 112, 114. *Perry* v. *Lancy*, 179 Mass. 183, 186.

The statute therefore must be considered a remedial act, and falls within that class of legislation which has been sustained when an existing legal remedy has been enlarged, even though in some instances made applicable to pending cases. *Foster* v. *Essex Bank*, 16 Mass. 245, 273. *Danforth* v. *Groton Water Co.* 178 Mass. 472. *Dunbar* v. *Boston & Providence Railroad*, 181 Mass. 383.*

The decree of the Superior Court, dismissing the bill on the ground that the statute was constitutional, must be affirmed.

Decree affirmed.

* See also *Wilson* v. *Head*, 184 Mass. 515 and *Yeomans* v. *Heath*, 185 Mass. 189, where the curtailment of a remedy given in the exercise of the police power was held to be valid as applied to pending cases and existing causes of action.

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ELIHU G. LOOMIS, trustee, *vs.* ROBERT S. GORHAM, & another, trustees, & others.

Suffolk. December 18, 1903. — October 17, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

Devise and Legacy, Construction. *Trust*, Termination.

A will, after giving $5,000 outright to a nephew and the same sum outright to a niece of the testator, gave to trustees, in trust for the same nephew and niece, "the sum of ten thousand dollars the net income to be paid them equally during their lives." *Held*, that each of the legatees took an equitable life estate in one half of the gift of $10,000, and that they took this interest as tenants in common and not as joint tenants, so that, on the death of one of them, the trust should be terminated as to one half of the fund of $10,000, which should be distributed under the residuary clause of the will, this construction being confirmed by provisions in other portions of the will.

BILL IN EQUITY, filed March 13, 1903, by the trustee under the will of Isaac D. Farnsworth, late of Boston, for instructions.

The case came on to be heard before *Braley*, J., who at the request of the parties reserved it upon the bill, answers and agreed facts for determination by the full court, such decree to be entered as equity and justice might require.

V. Skinner, for the trustee.

Roland Gray, for the defendants Gorham and Bryant, as trustees and guardians *ad litem*.

C. R. Darling, for Mary R. Melendy.

G. A. Sanderson, for Mary P. Jackson personally and as administratrix and guardian.

KNOWLTON, C. J. The will of Isaac D. Farnsworth late of Boston, deceased, contains this clause: "To my nephew Edwin W. Jackson of South Deerfield five thousand dollars. To my niece Mary Jackson of South Deerfield five thousand dollars. To Elisha Atkins and Charles D. Flint in trust for Edwin W. Jackson and Mary Jackson, as aforesaid the sum of ten thousand dollars the net income to be paid them equally during their lives." Edwin W. Jackson has deceased, and the question is whether the share of which he has received the income, goes to his legal representatives, or passes under the residuary clause

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of the codicil. It is contended that the language creating the trust gives an absolute estate to Edwin W. Jackson, to be held in trust during his life, and then to pass to his representatives. But we are of opinion that the testator intended to give him only a life estate in one half of the legacy, to be held in trust. In the first place, there is no disposition of any part of this legacy, except the income for the lives of the respective beneficiaries. In the same clause, in the language first quoted, there is a gift of $5,000 to each of them absolutely. Then follows the language in question, giving each of them for life the income of one half of $10,000. We think the distinction marked in the two parts of the clause is between an absolute estate and a life estate. The only expressed terms of the trust are that this income shall be paid for the lives of the respective beneficiaries. If the language is to be taken literally, on the death of both the trust ends, and the property is left in the hands of the trustees, to be disposed of under the residuary clause.

In the first codicil is a recital which shows that at the time of the execution of the original will the testator expected that there would be a residue undisposed of, and he gives this in his codicil to trustees for the benefit of Agnes Ryan. There is, therefore, no ground for a contention that our construction of the will produces an intestacy which the testator did not intend.

Our view is strengthened by the fact that later in the will the same trustees are given the sum of $10,000 for each of three persons, with a provision that the income shall be paid to each "beneficiary during her life, . . . then the principal to her heirs at her death." If the testator had intended that the gifts now in question should be treated in this way, we think he would have used similar language in stating the terms of the trust under which they are held. We are therefore of opinion that each of these two legatees took only an equitable life estate in one half of the gift of $10,000. See *Wainwright* v. *Tuckerman*, 120 Mass. 232; *Buffinton* v. *Maxam*, 152 Mass. 477; *Perkins* v. *Stearns*, 168 Mass. 247; *Wynn* v. *Bartlett*, 167 Mass. 292.

We are also of opinion that they took as tenants in common and not as joint tenants. It is a general rule that when a bequest is made to several persons, of income to be divided "equally" among them, they take as tenants in common and

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not as a class or as joint tenants. *Frost* v. *Courtis*, 167 Mass. 251. *Shattuck* v. *Wall*, 174 Mass. 167, 169. *Stanwood* v. *Stanwood*, 179 Mass. 223, 226. *Jones* v. *Randall*, 1 Jac. & W. 100. *Bryan* v. *Twigg*, L. R. 3 Eq. 433. It follows that as to one half of the principal sum of $10,000, the trust should be terminated, and that part of the principal, and such income as has accrued since the death of Edwin W. Jackson, should be paid over to the trustees who are entitled to the residue under the codicil, namely, the defendants, Robert S. Gorham and John D. Bryant.

So ordered.

FRANCIS A. O'BRIEN *vs.* BLUE HILL STREET RAILWAY COMPANY.

Suffolk. March 7, 1904. — October 17, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Negligence, On highway.

If the motorman of an electric car, coming around a bend in the road at a rate of speed not more than five or six miles an hour, sees a horse and wagon on the track at a point from two hundred and fifty to three hundred feet distant, and applying the brakes slackens the speed of the car and avoids a collision, but the horse being frightened plunges in front of the car and runs across the street into a telephone pole, injuring himself and the driver and demolishing the wagon, there is nothing to show negligence on the part of the motorman.

TORT for injuries to the plaintiff and the plaintiff's horse and wagon, from the horse being frightened through the alleged negligence of the defendant's servants operating a car on Washington Street in Canton. Writ dated March 26, 1900.

At the trial in the Superior Court *Fessenden*, J. ordered a verdict for the defendant; and the plaintiff alleged exceptions.

J. McGeough, for the plaintiff.

T. E. Grover, for the defendant.

BRALEY, J. Though the evidence was conflicting, it appeared from the plaintiff's statement that while he was driving along Washington Street, a public way in the town of Canton, it became necessary for him, in order to pass safely another traveller by carriage, to turn from the middle of the street to

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the right, and drive directly on to the tracks of the defendant's road located on the easterly side of the way, and as he continued his course and came to a turn in the road, he was warned by the vibration of the trolley wire that a car was approaching, and immediately turned to the left in order to leave the track; but the wheels of his wagon clung to the flange of the rails and slipped for a short distance; and he then saw for the first time that a car was approaching and "came round the bend just as I was swinging off the track; I should think that the car was about one hundred and fifty or two hundred feet* away from me when I first seen it; they came round the bend and were right on top of me almost in a moment. He rang his bell, and next thing I knew my horse got frightened; I couldn't control her. . . . I could not say how fast the car was going; it came on me so sudden. . . . The man at the brakes made a sort of an attempt to stop, — I don't know whether he got bewildered or what happened, but he slid I should say fifty or seventy-five feet, beyond where the accident happened before he came to a full stop." After the gong rang and the car approached nearer, the horse, which previously had been under control, became frightened, then unmanageable, and finally plunged in front of, and just escaped contact with, the car, ran across the street, and came into collision with a telephone pole, the plaintiff was thrown to the ground and hurt, his horse injured, while his wagon was demolished.

If the plaintiff as a traveller was found to have obeyed the law of the road in turning to his right to permit another conveyance to pass, then he was in the lawful use of that portion of the street occupied by the tracks of the defendant, and while neither of the parties had an exclusive use of the highway, each was required to observe a due regard for the rights of the other, and their respective privileges arising from such a concurrent use have been so fully defined by our decisions that no further discussion is now required in the consideration of this case. *Commonwealth* v. *Temple*, 14 Gray, 69. *Galbraith* v. *West End Street Railway*, 165 Mass. 572. *White* v. *Worcester Consolidated Street*

* On cross-examination the plaintiff testified that the car was three hundred feet away, and later said that it was not so far away as that.

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Railway, 167 Mass. 43. *Scannell* v. *Boston Elevated Railway*, 176 Mass. 170.

As the defendant does not claim that the plaintiff's conduct was careless, but confines its argument to the single proposition that the testimony wholly fails to disclose any negligence on its part, the question presented for decision is whether there was any evidence which required a submission of this issue to the jury.

In the management of the car the defendant was required to take reasonable precautions not only to avoid a collision, but also if possible to prevent its too sudden approach, as this naturally would tend to further excite a horse clearly seen to be restive and that soon escaped from the control of the plaintiff.

But an examination of the evidence discloses that the car was running at a speed of not over "five or six miles an hour" when it came around the bend in the road, and at a point from two hundred and fifty to three hundred feet distant from the plaintiff, and though the gong was sounded, the plaintiff did not testify that its ringing caused the fright of his horse, while the testimony of the defendant's witnesses that the brake was applied promptly, remained uncontradicted.

If it was the duty of the defendant's servants to anticipate the fact shown by common experience that travellers by carriage also might be using the highway at the same time, and the speed of the car and the skill with which it should be managed and controlled depended upon a proper recognition of these conditions, yet the car does not appear to have been running at an undue rate of speed, or to have been beyond the immediate control of the motorman; for on the application of the brake its speed slackened and a collision was avoided, though the point at which it was stopped was in dispute.

It was said in *Ellis* v. *Lynn & Boston Railroad*, 160 Mass. 341, 350, which is among the cases relied on by the plaintiff, that: "The motorman is supposed to know that his car is likely to frighten horses that are unaccustomed to the sight of such vehicles, while most horses are easily taught after a time to pass it without fear. It is his duty, if he sees a horse in the street before him that is greatly frightened at the car, so as to endanger his driver or other persons in the street, to do what he reasonably can in the management of his car to diminish the fright of the horse,

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and it is also his duty in running the car to look out and see whether, by frightening horses or otherwise, he is putting in peril other persons lawfully using the street on foot or with teams." See also *Benjamin* v. *Holyoke Street Railway*, 160 Mass. 3; *Thompson* v. *Holyoke Street Railway*, 170 Mass. 365; *Henderson* v. *Greenfield & Turner's Falls Street Railway*, 172 Mass. 542.

If this rule is applied to the conduct of the defendant's servants in the case at bar, it is plain that, upon the discovery of the situation of the plaintiff, and the excitement of his horse, the motive power was turned off, the brake applied, and every proper effort made by them not only to prevent a collision, but to avoid further frightening the horse.

As no negligence on the part of the defendant was shown, a verdict was ordered rightly in its favor.

Exceptions overruled.

ELECTRIC SUPPLY AND MAINTENANCE COMPANY *vs.* CONWAY ELECTRIC LIGHT AND POWER COMPANY.

Berkshire. September 13, 1904. — October 17, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Practice, Civil, Report of referee. *Referee*. *Contract*, Implied: common counts.

Where an action of contract on an account annexed for work and materials is sent by agreement of parties to a referee, under an order of court giving him power to decide finally all questions in the case, it is error to recommit his report on the ground that a part of his decision relates to a matter not included in the submission, merely because the matter referred to is not expressly mentioned in the account annexed, if the report tends to show that the matter in question was a part of the work and that the declaration might have been amended by including it in the description of the work in the account annexed.

CONTRACT on an account annexed for $439.76 alleged to be due for services and materials furnished in the repair of an electrical machine of the defendant. Writ dated February 10, 1902.

In the Superior Court the case was referred to John C. Crosby, Esquire, as referee. The order of reference was as follows: "The parties appear in court and agree to refer this case to the determination of John C. Crosby, Esq., who is approved by the

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court here, who is to notify, meet and hear the parties, and make report, &c., on or before January 1, 1903. The report of whom and the judgment of the court thereon to be final, and execution to issue accordingly. And if either party shall neglect or refuse to appear before the referee after due notice given of the time place appointed for hearing the parties, the referee may proceed ex-parte."

Later the case came on to be heard before *Pierce*, J. upon a report of the referee in favor of the defendant. On motion of the plaintiff the judge recommitted the report by the following order: "That said cause be recommitted to said referee to find what sum, if any, is due the plaintiff under said submission without deduction by reason of the matters relating to the tapering of the shaft."

In conformity with this order the referee filed a supplemental report, finding that without the deduction indicated the sum of $439.76 was due to the plaintiff. On the plaintiff's motion the judge ordered that the supplemental report of the referee be confirmed, and that judgment be entered for the amount named therein with interest from the date of the writ and costs of court. The defendant appealed, and also alleged exceptions.

W. A. Davenport, for the defendant.

C. E. Burke (*H. L. Dawes, Jr.*, with him,) for the plaintiff.

KNOWLTON, C. J. This case is before us on the defendant's exception to an order of the Superior Court, recommitting a report of a referee, with directions to report, disregarding certain matters which he had considered and included in his decision of the case. The original report was for the defendant; but the referee, in obedience to the order of recommittal and without hearing further evidence, made a supplemental report for the plaintiff. It appears that the judge of the Superior Court has allowed a motion for confirmation of the supplemental report and for judgment, and the case is therefore ripe for hearing on the bill of exceptions.

The original rule of the court to the referee, gave him power to decide finally all questions in the case, both of law and fact. It is not contended by the plaintiff's counsel that it is open to him to attack the original findings of the referee so far as they were within his jurisdiction under the order of reference. The

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report did not refer any questions of law to the court for its decision. The following language of the court in *Gardner* v. *Boston*, 120 Mass. 266, is equally applicable to the present case: "The claim was submitted without restriction or condition to a tribunal selected by the parties. The judgment of that tribunal cannot be impeached for error in the application of the rules of law, unless there is something in the terms of the submission or in the award which expressly or impliedly subjects it to the revision of the court. There is nothing here to show an intention to refer to the court any question whatever. It is not enough that the grounds of the award are stated or the conclusions of law adopted by the arbitrators as applicable to the facts found." See *Fairchild* v. *Adams*, 11 Cush. 549; *Ellicott* v. *Coffin*, 106 Mass. 365.

The only ground on which the order of recommittal is sought to be justified, is that a part of the decision of the referee related to a matter which was not included in the submission. It becomes necessary, therefore, to consider his findings in this particular, in connection with the pleadings.

The suit is an action of contract upon an account annexed, made up for the most part of items for labor and materials furnished in repairing a machine for generating electricity. The answer, among other things, avers in substance that the persons who performed the work were not competent to do it properly, and that the work was done so improperly that it was worthless. The first item is "To rewinding generator armature and repairing fields and materials therefor, $345." The contract for doing this did not definitely fix a price, but only gave an estimate, and the charge was made at what the plaintiff called a reasonable price. One part of the electrical generator was a commutator, which was attached to the shaft and had a bearing upon it from twelve to fourteen inches in length. This shaft was tapering. One Phillips, the plaintiff's secretary and agent, contracted with the defendant to do the work. The referee found that he went to Conway, the defendant's place of business, and "took charge of this work and rewound the armature, repaired the fields, furnished all material therefor, finished the work and started the generator." While this work was in progress the commutator was sent away to another company which repaired it. "When

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it was returned, and after the armature had been rewound and repaired, and the fields had been repaired by the plaintiff, the commutator was placed upon the shaft by Mr. Phillips with the assistance of others in his employ and under his direction." About a week afterwards one of the wires became disconnected, and Phillips was sent for and came to Conway and repaired it. From time to time afterwards the machine became out of repair, and other wires connected with the machine became broken, and expensive repairs upon it became necessary. The commutator worked loose because of the tapering form of the shaft, and this, according to the referee's findings, caused all the trouble. The commutator previously had worked properly upon the shaft, and afterwards, when the cause of the trouble had been discovered, it again worked properly. The referee found "that even if it was not the duty of the plaintiff's agent, Phillips, to repair the shaft, that it was his duty to know that the shaft was tapering and that the commutator might work loose." He also said in his report: "I find that it was the duty of Phillips, at least, to have called the attention of the defendant to its condition before starting the machinery in motion." He also found, that by reason of this neglect of Phillips, "the work which had been performed by the plaintiff in rewinding and repairing the generator and repairing the fields was made of no value to the defendant." He therefore found that the plaintiff was not entitled to recover for this and certain other items of the account, and that the items which were correctly charged had been paid for, and that the defendant was not indebted to the plaintiff.

The order recommitting the report directed the referee to find what sum was due the plaintiff under the submission, "without deduction by reason of the matters relating to the tapering of the shaft." Under this order the referee allowed these items in his supplemental report. The reason for the order, as stated in the motion on which the order was founded, was that these findings are "of a matter not in issue in said case, and of a matter not within said submission and not referred to said referee." We are of opinion that the record does not show this statement to be correct. If putting the commutator on the shaft was a part of the work for which the plaintiff seeks to recover, it is plain that negligence in not discovering the condi-

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tion of the shaft, and in putting on the commutator in a way which would leave it liable to work loose, and in starting the machinery while it was in that improper condition, might be considered as a ground for the recoupment of damages. *Higby* v. *Upton*, 8 Met. 409. *Austin* v. *Foster*, 9 Pick. 341, 345. *Dodge* v. *Tileston*, 12 Pick. 328, 332. It does not appear that putting the commutator on the shaft and bringing the parts of the machine together were not a part of the plaintiff's work which is included in the first item for which it seeks to recover. We think the report tends strongly to show that they were a part of this work. It is true that they are not mentioned by name in the account; but if they were in fact a part of the work for which the $345 was charged, the declaration properly might have been amended as to the description of the work in the item. That item was undoubtedly intended to include all the work that the plaintiff did at that time, a part of which was putting the parts of the machine together and adjusting the commutator upon the shaft. The referee's finding is: "When the work was completed, the plaintiff had rewound the armature, repaired the generator and repaired the fields. The price charged for all this work by the plaintiff was $345 and is the first item in the plaintiff's account annexed." The other finding that Phillips and his workmen put the commutator upon the shaft, implies that it was a part of the repair of the generator which was charged for in this item. At least, we are of opinion that the referee's report and other parts of the record, failed to show that it was not. We cannot say that it was not one of the matters which were included in the submission. For these reasons, we are of opinion that the entry should be

Exceptions sustained.

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CHARLES E. GIBSON *vs.* INTERNATIONAL TRUST COMPANY.

Suffolk. January 18, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence, In maintaining elevator, Proximate cause. *Evidence*, Opinion: Experts.

Semble, that it is no evidence of negligence on the part of one maintaining a passenger elevator to permit a movable stool to remain in the elevator for the use of the operator.

Semble, that the opinion of one who has had an extended experience in the charge of passenger elevators, that a movable stool is not a safe article to put into a passenger elevator, is not competent evidence.

In an action for personal injuries from the starting of an elevator while the plaintiff was alighting, caused by the operator of the elevator grasping the lever when falling back in trying to sit down on a stool which had been moved without his knowing it, the question whether it is evidence of negligence to permit a movable stool to remain in a passenger elevator is not material, as the grasping of the lever and not the presence of the stool was the proximate cause of the accident.

TORT for personal injuries from the starting of an elevator in the building of the defendant at the corner of Milk Street and Devonshire Street in Boston, as the plaintiff was passing out of the elevator, through the alleged negligence of the defendant's servants in the operation of the elevator. Writ dated November 23, 1896.

At the first trial of this case the jury returned a verdict for the plaintiff, and exceptions alleged by the defendant were sustained by a decision of this court reported in 177 Mass. 100. At the second trial *Fessenden*, J. ordered a verdict for the defendant; and the plaintiff alleged exceptions.

Hersey, mentioned in the opinion, was the young man who operated the elevator. Bagley was the janitor of the building. There was a movable stool in the elevator for the operator to sit on when he pleased. Hersey stopped the car by pushing the lever and opened the door, and the plaintiff proceeded to get out. Bagley who was standing behind Hersey, with the stool between them, had moved the stool back a few inches. Hersey not knowing this attempted to sit down, missed the stool and

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fell back. In falling he grasped the lever, thus starting the car and causing the plaintiff's injuries.

The case was argued at the bar in January, 1904, before *Knowlton*, C. J., *Lathrop*, *Barker*, *Hammond*, & *Braley*, JJ., and afterwards was submitted on briefs to all the justices.

S. L. Whipple, for the plaintiff.

R. M. Morse & J. Lowell, for the defendant.

HAMMOND, J. When this case was first before us, Lathrop, J., speaking for the court, used the following language: "We are of opinion . . . that the jury should have been instructed, as requested, that there was no evidence that Bagley was at the time of the accident employed in the operation of the elevator. The evidence was that he was the janitor of the building; that he had gone to the eighth floor for some tools, and was returning, as a passenger, on the elevator when the accident happened. Bagley in moving the stool did not act as the servant or agent of the defendant; and the defendant is not liable for his act in moving the stool, if it were negligent in him to move it. There is nothing in the evidence to show that he was exercising any control over the running of the elevator, or that he was at the time of the accident doing anything more than riding as a passenger. The moving of the stool cannot be considered as an act within the scope of his employment at that time." 177 Mass. 100, 102.

Upon this point the evidence at the second trial differs from that at the former trial only in showing in greater detail the duties of Bagley. In substance, however, it is the same, and, so far as respects the contention of the plaintiff that Bagley's act in moving the stool (if indeed he moved it at all) was an act done within the scope of his employment as a superintendent, the former decision must be regarded as conclusive against the plaintiff.

At this second trial the plaintiff contended that he was entitled to go to the jury on the ground that there was negligence in permitting the movable stool to remain in the elevator, and he cites the testimony of Kilgoure, who said that as the result of an extended experience in the charge of passenger elevators he did not believe such a stool was "a safe article to put into a passenger elevator." It is a matter of common knowledge,

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however, that passenger elevators are often furnished with such stools, and we do not think that whether they may be there safely is a matter for expert testimony. As well might it be said that a cushion upon a seat in a car is dangerous because it might slip and let a passenger down.

But even if it be otherwise, there is no such connection between the presence of the stool and this accident as to make the question material. The direct and proximate cause of the accident was the starting of the elevator caused by Hersey's act in clutching the lever to save himself from falling. The accident might not have happened if the stool had not been moved, but the direct and proximate cause of it was not the moving of the stool, but Hersey's act, and this was a mere mischance for which neither Hersey nor any one else was at fault. Neither Bagley nor any one else could have anticipated such a result. We think that the case shows a pure accident which could not have been anticipated or foreseen. In the opinion of a majority of the court the entry must be,

Exceptions overruled.

WILBUR F. MORRISON *vs.* CITY OF LAWRENCE.

Essex. March 9, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Schools and School Committee. Evidence, Competency, Of intent. *Practice, Civil*, Exceptions.

In an action against a city for the alleged unlawful exclusion of the plaintiff from its public schools, the plaintiff may testify to what was said by the principal of the school from which he was excluded to the superintendent of schools, when the principal took the plaintiff before the superintendent, the interview resulting in the superintendent informing the plaintiff that he was suspended, although neither the superintendent nor the principal are parties to the action, it being a part of the plaintiff's case to show that he did not leave school voluntarily and to show the character of his exclusion, especially where the principal himself on cross-examination as a witness at the trial has given a narration of the proceedings before the superintendent.

No exception lies to the admission of evidence afterwards introduced in another form without objection from the excepting party.

In an action against a city under St. 1898, c. 496, § 9, (R. L. c. 44, § 7,) for the

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alleged unlawful exclusion of a pupil from its public schools, if it appears that before the pupil's permanent exclusion the school committee gave him a fair trial at which he was allowed to present the merits of his cause, mere errors in the admission or exclusion of evidence by the committee are not enough to invalidate a final decision against him, but if it appears that evidence, offered by the pupil and material to his defence before the committee, was excluded in such a manner as to exhibit prejudice against the pupil or a wilful indifference to his rights, a jury may find that the school committee did not conduct the hearing in good faith. On the evidence in the present case it was held, that the question, whether the school committee acted in good faith in conducting the hearing given to the plaintiff before his permanent exclusion, was a question of fact for the jury under proper instructions from the presiding judge.

TORT for the alleged unlawful exclusion of the plaintiff from the public schools of the defendant. Writ dated April 13, 1900.

At the first trial of this case the jury returned a verdict for the plaintiff. Exceptions alleged by the defendant were sustained and a new trial was ordered by this court in a decision reported in 181 Mass. 127. At the new trial before *Wait*, J., the defendant excepted to the admission of the testimony of the plaintiff as to what was said by the principal of the school from which the plaintiff was excluded to the superintendent of schools, when the principal took the plaintiff before the superintendent, the interview resulting in the superintendent informing the plaintiff that he was suspended. At the close of the evidence, the defendant requested the judge to rule, that upon the facts shown by the evidence, there being no dispute as to what took place before the school committee, the question of good faith on the part of the school committee was a question of law, which should be decided by the judge and should not be submitted to the jury, and that upon all the evidence the defendant was entitled to a verdict. The judge refused to rule as requested, and submitted to the jury, under instructions that were not otherwise objected to, the question whether or not the school committee acted in good faith.

The jury returned a verdict for the plaintiff in the sum of $750; and the defendant alleged exceptions.

The case was argued at the bar in March, 1904, before *Knowlton*, C. J., *Morton*, *Lathrop*, *Loring*, & *Braley*, JJ., and afterwards was submitted on briefs to all the justices.

J. P. Kane, for the defendant.

J. P. Sweeney, for the plaintiff.

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BRALEY, J. This is an action of tort to recover damages for the wrongful exclusion of the plaintiff from the high school maintained by the defendant, and the plaintiff having obtained a verdict, the case is here on exceptions taken by the defendant to the admission of evidence, and to adverse rulings as to its liability. If these are taken up in their order, the exception to the admission of certain evidence is to be first considered.

It was obligatory on the plaintiff to show that he did not voluntarily leave school. For this purpose it was open to him to prove that he left because suspended by the superintendent of schools, and that his suspension, which was confirmed by the committee, had followed immediately upon a statement made in his presence by the principal of the school who had taken him for this purpose before the superintendent. It also became important to describe the character or show the object of the act which formed a part of the transaction in issue, and what was said at the time became admissible, although neither the superintendent nor the principal were parties to the action. *Haynes* v. *Rutter*, 24 Pick. 242, 245. *Lund* v. *Tyngsborough*, 9 Cush. 36, 42.

Besides, after the plaintiff had testified, the statement containing the charges then made, and afterwards repeated before the committee by the principal, who became a witness at the trial, was admitted without objection, and the defendant fails to show that it was prejudiced by the introduction of evidence, which it contended at one time was irrelevant and which afterwards when introduced in another form it did not oppose, though covering the same subject. *Peebles* v. *Boston & Albany Railroad*, 112 Mass. 498. Moreover, it is shown by the exceptions that the principal had been the plaintiff's accuser from the beginning, and his cross-examination as to what he had said and done concerning the plaintiff, including a narration of the proceedings before the superintendent, was competent in connection with the issue presented as indicating the nature of the relations between them, and it would be for the jury to determine how far, if at all, it affected his credit as a witness. *Commonwealth* v. *Jennings*, 107 Mass. 488, 491. See also *Proprietors of Liverpool Wharf* v. *Prescott*, 4 Allen 22.

The remaining exception to the refusal to rule that upon all

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the evidence there was no issue of fact for the consideration of the jury, and the defendant was entitled to a verdict, present the principal questions raised and argued. It must be taken as settled in the management of the public schools, that when a school committee acts in good faith while exercising the plenary powers conferred upon them by statute, and order the permanent exclusion of a scholar therefrom, no suit can be maintained by him because of their action. *Watson* v. *Cambridge*, 157 Mass. 561, 563. *Bishop* v. *Rowley*, 165 Mass. 460, 462.

But before such an order can be considered final, under St. 1898, c. 496, § 9, in force at this time, the pupil if his parent or guardian desires must be granted a hearing; otherwise such exclusion becomes unlawful. *Bishop* v. *Rowley*, *ubi supra*. See also in this connection R. L. c. 44, § 8. And it was said in the former decision of this case, when discussing the action of the committee which, it was then claimed, prevented the plaintiff from introducing evidence of certain witnesses at such a hearing held for the purpose of ascertaining the facts, that "It may or may not have had an important bearing upon the hearing, but it has not been contended that the committee were acting otherwise than in good faith," and the verdict for the plaintiff was set aside and a new trial ordered. *Morrison* v. *Lawrence*, 181 Mass. 127, 131.

At the second trial the plaintiff rested his right to recover solely on the ground that after notice of his exclusion from school, though the committee granted to him an opportunity to be heard, they did not act in good faith because they refused to allow him fully to present his side of the case, and he contends that their action was equivalent to a denial of a hearing, and his exclusion which was treated by them as final became unlawful. It is therefore necessary to determine whether there was any evidence to be submitted to the jury in support of his contention.

A hearing of this nature does not take on all the formalities of a trial usual in a court of law, nor is it necessarily governed by the strict rules of evidence, and a school committee is apparently not included among those special tribunals which have power to summon or compel the attendance of witnesses, or before whom witnesses may be compelled to attend and give

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evidence. Pub. Sts. c. 112, § 25; c. 169, §§ 7, 8. Sts. 1882, c. 267; 1883, c. 195; 1885, c. 323, § 2; 1891, c. 140; 1898, c. 374; 1900, c. 267, § 1. R. L. c. 175, §§ 8–11. *Whitcomb's case*, 120 Mass. 118, 123. *First National Bank of Chicago* v. *Graham*, 175 Mass. 179.

If the plaintiff had summoned witnesses their attendance could not have been enforced, or if voluntarily present, they might have refused to testify, and the committee could not have aided him, and so far as his case depended on their evidence he would have been remediless.

Nevertheless, they were required to grant him a full opportunity to be heard upon the facts, to hear and consider the testimony of such witnesses as he might call, and permit him fully to present his case in such orderly manner as they might direct.

The hearing afforded may be of no value if relevant evidence, when offered, is refused admission, or those who otherwise would testify in behalf of the excluded pupil are prevented from doing so by the action of the committee. How far an administrative board clothed with quasi judicial powers, which has decided upon a definite course of action in a case, will be willing to review its decision, must depend largely upon the sound judgment and sense of justice of its members; but in granting this right to a pupil whom they propose to exclude permanently from the benefit of the public schools, the law presumes that when called upon to reconsider their purpose they will listen patiently to his case as fully as he wishes to present it, so long as such presentation does not extend beyond the legitimate limits of the issue involved. When it appears that a fair trial has been given, and that the pupil has been allowed to present the merits of his cause, mere errors committed in the admission or exclusion of evidence are not enough to make invalid a final adverse decision. *Bishop* v. *Rowley* and *Morrison* v. *Lawrence*, *ubi supra*.

It was contended by the plaintiff that the controversy between him and the principal arose out of an article derogatory to the latter, published in his father's newspaper, and that his exclusion was caused by the publication of this criticism and not because of inattention to his studies or for want of correct deportment.

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After his "indefinite suspension" had been ordered, and remained unmodified, the plaintiff's father asked for a hearing before the committee, and upon this being granted, the plaintiff appeared at the time and place designated by them. The principal of the high school also was present, and by vote of the committee each was permitted to have the assistance of counsel.

The principal was allowed properly to go forward and make a detailed statement in writing of the plaintiff's standing and conduct as a student, and this was followed by an accusation that an article, either incited or written by him, criticising the management of the school, had appeared in a newspaper published by the plaintiff's father, and that upon investigation he had ascertained that the plaintiff had sought to instigate other pupils of the school to write similar articles, and also had urged them to read those already published; and the pupils who had furnished him with this information were present, at his request, at the hearing. Although the school records brought by him, showing the plaintiff's deportment and his rank as a scholar, were neither read, examined, nor put in evidence, it appeared upon cross-examination that pupils were not suspended for deficiencies in their studies, while for eighteen months before his suspension the monthly record of the plaintiff's behavior sent to his father, showed his conduct to be satisfactory.

This testimony of the principal was supplemented by a written statement of the teachers in the school that the plaintiff had sought to undermine the authority of the principal and to incite other pupils to write articles for publication to influence the community against those "working for the good of our school." If to this is added his admission of language used by him when he sent the plaintiff home and told him not to return and "that he had never made any charges before the school committee with reference to the plaintiff's studies or his prior conduct until after the suspension, and until he went before the meeting of the sub-committee which was held for the purpose of formulating charges against the plaintiff and giving reasons for his suspension", there was evidence from which it might be inferred that his action was taken not for the sole reason that the plaintiff had neglected his studies, or failed to conduct himself properly in school, but also, as stated later in the letter sent by the com-

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mittee to the plaintiff's father giving the reasons for their action, because of "his incitement of his fellow pupils to write newspaper articles derogatory of the principal of the high school", tending "to subvert the authority of the principal and impair the discipline of the school, and was, moreover, such as to warrant his indefinite suspension."

It therefore became vital for the plaintiff, if he was to meet this serious accusation, to show, if possible, not only that the offensive publication was not written or instigated by him, but that he had not incited other pupils to take similar action, or sought to raise a spirit of insubordination in the school, and that his fellow pupils had not given such information to the principal; and for this purpose he called one of them as a witness to whom, apparently, the principal had referred.

In what followed, the action of the chairman could be found to reflect the attitude of the committee, and might be open to more than one conclusion. It was plain that much friction had arisen between the plaintiff and the principal, and the disagreement between them had spread, to some extent, to the pupils of the school, and that to permit them to testify, presumably in contradiction of the principal, would tend to weaken his authority, impair his influence, and bring discredit upon the school itself. And without any intention of taking an unconscientious advantage of the plaintiff, and perhaps not acting with cool deliberation, they took the position that in the sound management of the school, for the interest of the community, they ought not to permit a pupil to be examined on an issue of fact between the principal and the plaintiff, or to contradict him as a witness. Upon being informed that the only testimony which the plaintiff could present upon this part of the charge was that of his fellow students, this ruling was modified, so that "if any of the pupils wished to volunteer a statement in the matter or contradict anything said of them by the principal, they might do so." If this view is taken want of good faith had not been proved.

Generally in actions of tort at common law intent or motive is material only on the measure of damages. *Hawes* v. *Knowles*, 114 Mass. 518. *Rideout* v. *Knox*, 148 Mass. 368, 372. *Burt* v. *Advertiser Newspaper Co.* 154 Mass. 238, 245. But, as in this case, it may be an element on which liability for a statutory

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tort finally rests, and when it is the subject of inquiry, the issue raised is one of fact and not of law, and often must be ascertained from results. See *Learock* v. *Putnam*, 111 Mass. 499.

Before the hearing began, counsel for the principal had stated to the committee the nature of the hearing, and accurately defined their powers and duties when sitting as a trial tribunal, and the presumption, until rebutted by proof, is, that they intended the natural and probable consequences of their action on the rights of the plaintiff.

The witness when called was apparently willing to testify, but after the ruling was announced declined to volunteer, and it could be found that he was prevented from giving evidence, or coerced to remain silent by the action of the committee.

As none of the pupils present offered themselves as witnesses, the legitimate effect of the decision was to cause the exclusion of lawful evidence that might have been introduced, and that was material to the plaintiff's defence, and could not be supplied from any other source. This method of procedure when intelligently adopted by a tribunal charged with an impartial investigation of fact, to be followed by a determination of the rights of the plaintiff, cannot be considered a hearing in the accustomed sense, or to denote an inquiry of a judicial character.

If the course pursued was found to exhibit on their part either prejudice against the plaintiff whose conduct was under investigation, or wilful indifference to his rights, there would be evidence to support an allegation that they were not acting with a desire to meet the full requirements of such a hearing, but intentionally went outside of them for some purpose that whether wrongful or lawful equally resulted in a wrong to him. *Plant* v. *Woods*, 176 Mass. 492, 499. *Squires* v. *Wason Manuf. Co.* 182 Mass. 137, 141. *Wills* v. *Noyes*, 12 Pick. 324, 328. And the adjudication of the committee becomes inconclusive in a suit of this nature. *Bishop* v. *Rowley* and *Morrison* v. *Lawrence*, *ubi supra*.

It therefore became a question for the jury to determine whether in pursuing this course the school committee were actuated by a spirit of judicial fairness, or whether their conduct was susceptible of the other interpretation. *Londy* v. *Driscoll*, 175 Mass. 426, 427.

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The distinctions we have discussed must have been fully pointed out and presented in a manner satisfactory to the defendant, for the exceptions state that the case was submitted to the jury under instructions to which no objection was made. *Lane* v. *Old Colony & Fall River Railroad*, 14 Gray, 143, 147. *Townsend* v. *Hargraves*, 118 Mass. 325, 333.

In the opinion of a majority of the court, as no error of law is found, the order must be

Exceptions overruled.

F. BLANCHARD McCURDY & another *vs.* CHARLES A. McCALLUM & others.

Middlesex. September 8, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Conflict of Laws. Evidence, Proof of foreign law. *Practice, Civil*, Report. *Trust*, Precatory. *Devise and Legacy*, Construction. *Words*, "Request."

A will proved in the domicil of the testator in a foreign country is to be construed by the law of that country.

Where a report from a judge of the Superior Court sitting in equity speaks of the "questions of law" raised, and reports a "finding" of the judge as to the law of Nova Scotia, the report submits to this court a question of fact as to the law of that province. In this case the question was to be decided upon the pleadings and an agreed statement of facts, by which it was stipulated that either party might refer to the reports of the Supreme Court of Nova Scotia, the reports of the Supreme Court of Canada, and the reports of any courts in England, as well as to any English text books on the subject in question, it being agreed that the law of Nova Scotia on that subject was the same as that of England.

A testatrix, a widow, after providing for her children other than her son H., made the following bequest to her daughter in law S. wife of H.: "To S. wife of H., I devise and bequeath the sum of $2000 this amount is to be free from the control of her husband and her son G., and I request the said S. at her death to give the same to her two daughters V. and M., but the receipt of the said S. for the said amount shall be a sufficient discharge to my executors therefor." *Held*, that, under the law of Nova Scotia as proved in the case, this bequest, construed in the light of other portions of the will, created a trust, under which S. held the $2,000 with the right to use the income during her life, the principal to go to her two daughters upon her death, the word "request" being used in an imperative sense.

BILL IN EQUITY, filed November 23 and amended December 8, 1903, by a judgment creditor of Susan B. McCallum, of the

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Province of Nova Scotia in the Dominion of Canada, to obtain $2,000 alleged to have been transferred and conveyed by her to Vesta Vane McCallum, for the purpose of delaying and defrauding the plaintiffs in the collection of their claim, and alleged to be in the possession of the defendants, Charles Adams McCallum of Newton, and Vesta Vane McCallum of Belmont, both in this Commonwealth.

The answers alleged that the $2,000 in question had been held by Susan B. McCallum, not as her own property, but in trust for her daughters Vesta Vane McCallum and Marion McCallum, under the will of M. Jane McCallum, late of Maitland in the Province of Nova Scotia.

In the Superior Court the case was heard by *Hardy*, J. upon an agreed statement of facts. He made a decree dismissing the bill with costs, but at the request of the plaintiffs reported the case for determination by this court. If the court should be of opinion that the judge's "finding" was correct the entry was to be "Bill dismissed with costs"; otherwise, such decree was to be entered as this court might consider proper.

The will of M. Jane McCallum, proved and allowed by the Probate Court for the County of Hants in the Province of Nova Scotia, on May 23, 1902, was as follows:

"I, M. Jane McCallum of Maitland in the County of Hants and Province of Nova Scotia, widow of the late Archibald McCallum, declare this to be my last will and testament.

"1. I, hereby nominate and appoint my son Charles Adams McCallum of Newton Highlands in the State of Massachusetts, and Norman J. Layton of Truro in the County of Colchester, barrister-at-law, to be the executors and trustees of this my will.

"2. I hereby devise and bequeath to my son Oscar F. McCallum M. D. the homestead property formerly owned by the late Archibald McCallum and situate at Maitland aforesaid, with all of the Dyke Marsh formerly owned by said Archibald McCallum, and being all the real estate that was bequeathed to me under the will of the said Archibald McCallum, to have and to hold the said lands and premises unto the said Oscar F. McCallum his heirs and assigns forever.

"3. To my said son Charles Adams McCallum I devise and

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bequeath the sum of ten thousand dollars ($10,000.00) and his father's old watch and chain.

"4. To my granddaughter Ida St. Clair Douglas I devise and bequeath the sum of seven thousand dollars (7,000.00) and in addition thereto I require my executors and trustees to invest in their own names the sum of $8,000.00 and the interest or dividends arising therefrom they are to pay to my said granddaughter Ida St. Clair Douglas until she is married, and after her marriage they are to pay over the said principal sum of eight thousand dollars to the said Ida St. Clair Douglas, but if the said Ida St. Clair Douglas should die without being married then the said sum of eight thousand dollars is to revert to my estate and go to the residuary legatees under this my will.

"5. To Susan McCallum wife of Hugh McCallum, I devise and bequeath the sum of two thousand dollars ($2,000.00) this amount is to be free from the control of her husband and her son Guy McCallum, and I request the said Susan McCallum at her death to give the same to her two daughters Vesta Vane McCallum and Marion McCallum, but the receipt of the said Susan McCallum for the said amount shall be a sufficient discharge to my executors therefor.

"6. To Jennie McCallum daughter of Israel McCallum I devise and bequeath the sum of one thousand dollars ($1,000.00).

"7. To Robert McCallum son of Israel McCallum I devise and bequeath the sum of one thousand dollars ($1,000.00).

"8. To Archibald Clinch, son of D. C. Clinch of Saint John N. B. I devise and bequeath the sum of one thousand dollars ($1,000.00).

"9. To Oscar A. McC. Wilson, son of Edward F. Wilson, I devise and bequeath the sum of one thousand dollars ($1,000.00).

"10. To my granddaughter Minnie Urquhart daughter of Lucy Urquhart I devise and bequeath the sum of one thousand dollars ($1,000.00).

"11. To my granddaughter Gertrude Urquhart daughter of Lucy Urquhart I devise and bequeath the sum of one thousand dollars ($1,000.00).

"12. To my son Israel McCallum I devise and bequeath the sum of one thousand dollars ($1,000.00).

"13. To my daughter Mrs. Lucy Urquhart I devise and bequeath the sum of one thousand dollars ($1,000.00).

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"14. To my daughters Maria Douglas, Susan Clinch and Anna N. Wilson I devise and bequeath the sum of three thousand dollars ($3,000.00) each.

"15. To the Reverand Chalmers Jack formerly Presbyterian Minister at Maitland I devise and bequeath the sum of five hundred dollars ($500.00).

"16. To the Reverand George Ross the Presbyterian Minister at Maitland I devise and bequeath the sum of eight hundred dollars ($800.00).

"17. To the trustees of Saint Davids Presbyterian Church at Maitland I devise and bequeath the sum of five hundred dollars ($500.00) for the purposes of said church.

"18. My said executors shall not be required to pay any legacy under this my will sooner than one year after my decease, and should there not be sufficient funds in my estate to pay all the cash legacies in full each cash legacy shall abate pro rata.

"19. Should my grandsons Archibald Clinch and Oscar A. McC. Wilson or either of them not have arrived at the age of twenty-one years when my said executors are ready to pay their legacies, then I hereby authorize my said executors to pay their said legacies to either of their parents, and the receipt of either parent of the said Archibald Clinch and Oscar A. McC. Wilson for their respective legacies shall be a sufficient discharge to my said executors therefor.

"20. All the rest and residue of my estate I devise and bequeath to my daughters Maria Douglas, Susan Clinch and Anna F. Wilson, whom I hereby make my residuary legatees, share and share alike.

"21. And I hereby revoke all former wills by me at any time heretofore made.

"In witness whereof I have hereunto subscribed my name and affixed my seal this twenty-sixth day of April in the year of our Lord one thousand nine hundred and two. M. Jane McCallum." [seal]

"Signed by the said testator as her last will and testament, in the presence of us, present at the same time, who at her request, in her presence, and in the presence of each other have subscribed our names as witnesses. R. F. O'Brien, Herbert Eaton, Norman J. Layton."

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J. E. Eaton, E. T. McKnight & P. W. Carver, for the plaintiffs.
F. G. Cook, for the defendants.

HAMMOND, J. The first question is whether the bequest made to Susan B. McCallum in the fifth clause of the will of M. Jane McCallum is absolute, or upon trust. Inasmuch as the testatrix was domiciled and the will was proved in Nova Scotia the construction, meaning and legal effect of the clause is to be determined by the law of that province, which it is agreed is the same as the law of England. While the report speaks of this question as one of the "questions of law" raised at the trial before the Superior Court, yet, being a question as to the law of a foreign country, it is here one of fact, and the judge who signs the report speaks of his "finding" with reference to it. While in this and other respects the language used in the report is somewhat conflicting, still we think it plain that the report submits to us this question as a question of fact to be decided upon the pleadings in connection with the agreed statement of facts, in the twelfth paragraph of which it is stated that "either party may refer to the reports of the Supreme Court of Nova Scotia, the reports of the Supreme Court of Canada, and the reports of any courts in England, as well as to any English text books on the subject."

The clause in question reads as follows: "5. To Susan McCallum wife of Hugh McCallum, I devise and bequeath the sum of two thousand dollars ($2,000.00) this amount is to be free from the control of her husband and her son Guy McCallum, and I request the said Susan McCallum at her death to give the same to her two daughters Vesta Vane McCallum and Marion McCallum, but the receipt of the said Susan McCallum for the said amount shall be a sufficient discharge to my executors therefor."

The question is as to the meaning of the word "request." Is the word used simply to make to Susan a suggestion which she is at liberty to disregard if she sees fit, or is it imperative? This question is to be decided in the light of the authorities upon the English law which have been cited by the respective counsel.

From a perusal of these authorities it is manifest that, while in the earlier cases there was a disposition to formulate general rules and to give to a particular word or phrase the same meaning in one will as in another, sometimes even at the risk of

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defeating the real intention of the testator, the later cases, in trying to ascertain the true meaning of a word or clause, are inclined to give more consideration to the language of the whole will, and to the particular circumstances of each case. In England, as here, the cardinal rule in the interpretation of wills, to which all other rules must bend, is that the intention of the testator shall prevail, provided that it is consistent with the rules of law. A vigorous statement of the manner in which this rule is applied in England in recent cases is to be found in the following language of Lindley, L. J. in *In re Hamilton*, [1895] 2 Ch. 370, 373: "You must take the will which you have to construe and see what it means, and if you come to the conclusion that no trust was intended, you say so, although previous judges have said the contrary on some wills more or less similar to the one which you have to construe." As to this very word "request," it has been held in several cases (see *Eade* v. *Eade*, 5 Madd. 118, decided in 1820) that it was mandatory, and in several (see *Hill* v. *Hill*, [1897] 1 Q. B. 483) that it was not. While it is true, as stated by Lord Esher in *Hill* v. *Hill*, that "words of request in their ordinary meaning convey a mere request, and do not convey a legal obligation of any kind either at law or in equity," it is also true, as stated by Lindley, L. J. in *In re Williams*, [1897] 2 Ch. 12, that "Not only in wills but in daily life an expression may be imperative in its real meaning although couched in language which is not imperative in form"; and that "A request is often a polite form of command." In wills words have their ordinary signification unless in the particular case there is something which leads to the conclusion that the testator used them in a different sense.

At the time this will was made the testatrix was a widow of advanced age, having several children and grandchildren. In the first item she nominates persons to be executors; in the second she devises certain real estate in fee to her son Oscar; in the third she gives $10,000 to her son Charles; in the fourth she gives $7,000 to her granddaughter Ida absolutely, and in addition establishes a trust for her. Then follows the fifth clause, and after that come several clauses containing various bequests of money to her children, grandchildren and other legatees, and finally a residuary clause to three of her daughters.

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In general the will is drawn in apt language, and is very clear; and it is hard to see how any question could be raised as to the meaning of any item except the one now under consideration.

Susan, the legatee named in this fifth item, was the wife of Hugh McCallum the son of the testatrix. Although, as before stated, many of the children and grandchildren receive bequests, all of which with the exception of the trust fund created for the granddaughter Ida in the fourth item are absolute, still the testatrix, for reasons satisfactory at least to herself, treated the family of her son Hugh in a peculiar way. She was willing that $2,000 should go to that family, but she was determined that neither Hugh nor his son Guy should have anything whatever to do with this bequest. She makes the bequest to Hugh's wife, in whom she apparently has confidence, and declares that it shall be entirely free from the control of the husband or son, and she "requests" that Susan shall at her death give it to her daughters, who are the granddaughters of the testatrix. The request is from a woman to her daughter in law, a person connected with her by family ties. This is not a case where there is uncertainty as to the objects of the trust, or as to the amount of it, or where there are any words, as for instance "if she thinks best," or "at her discretion," expressly giving a clear discretion or choice, or where there are words like "absolutely" directly expressing that the bequest is absolute. On the contrary the objects of the bounty, namely, the two granddaughters, are clearly specified, the amount of the trust fund is clearly stated, it is not mingled with any other property, and the relations of the testatrix to the objects of the trust are such as to indicate a strong motive for the bounty and for this method of providing it.

Whether these considerations would of themselves be sufficient to show a trust in this case we are not called upon to decide, because we are of opinion that the intent of the testatrix to create a trust is quite clearly shown by the last clause of the item in question, when it is considered in connection with similar language in the nineteenth item and with the other parts of the will. In this last clause the testatrix provides that "the receipt of the said Susan McCallum for the said amount shall be a sufficient discharge to my executors therefor." It is to be noted that wherever in the will a legacy is given absolutely there is no such

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provision as to the receipt of the legatee. None is needed. In the case of an absolute legacy the receipt of the legatee for the amount of his legacy when paid to him is sufficient, and so the will assumes. If therefore this legacy to Susan was absolute, there was no need of this clause, but if it was charged with a trust there was need of it. It must be assumed that the testatrix's intention was definite, and that it was known at least to her. This clause is very significant as showing what her intention was. But this is not all. In the eighth item there is an absolute bequest of $1,000 to Archibald Clinch, and in the ninth item a similar bequest of like amount to one Wilson, both being grandsons of the testatrix. In the nineteenth item it is provided that if these grandsons or either of them shall not have arrived at the age of twenty-one years when the executors are ready to pay the legacies, then the executors are authorized to pay to their parents, "and the receipt of either parent" of these legatees for their respective legacies "shall be a sufficient discharge" therefor. It is certain that the payment of these legacies to the parents and their receipt for the same would not have been a discharge to the executors except for the provision in the will, and hence the provision. The inference is strong that the last clause of the fifth item was inserted for similar reasons, namely, that the person who was not legally entitled to the legacy might receive it and discharge the executors from further liability.

In view of the language of the fifth item when read in connection with the other parts of the will, and of all the circumstances, we are of opinion, upon the authorities placed before us, that by the law of Nova Scotia the word "request" in the fifth item of the will is imperative, and that Susan McCallum holds the $2,000 with the right to use the income during her life, and that the principal is charged with a trust in favor of her two daughters.

We understand that this view of the legal effect of this item under the law of Nova Scotia agrees with that taken by the judge who made the report which is before us, and is the "finding" to which he alludes, and which under the form of the report is decisive of the case. In accordance with the terms of the report, therefore, the following entry must be made:

Bill dismissed with costs.

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GEORGE CROSSIN *vs.* CHARLES D. BEEBE.

Berkshire. September 13, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Practice, Civil, Exceptions, Verdict.

Until a general verdict has been returned on which a judgment can be entered, no exception lies to the refusal of a presiding judge to rule upon facts found by the jury in answer to specific questions.

BRALEY, J. This is an action of contract brought in the District Court of Central Berkshire to recover a balance due on a promissory note given by the defendant, on which several payments had been made. The answer pleaded payment and tender before suit of the amount admitted to be due, followed by payment into court of this sum for the use of the plaintiff.

At the trial on appeal in the Superior Court, the sole issue of fact was whether two of these payments, one of $50 and one of $20 had been made. The defendant contended and testified that he had made the first payment by his check to the order of the plaintiff delivered to the plaintiff's wife, and the second in money to a son of the plaintiff, who had been sent to demand "money on the note," each of whom as a witness contradicted his evidence.

It appeared that the payee's name was indorsed on the back of the check, which was presented to and paid by the bank on which it was drawn, and charged to the defendant's account; and there was evidence that this indorsement was made by one of the plaintiff's sons, though the plaintiff denied that he had received either the check or the money, or that the indorsement was made by his authority.

On this state of the evidence, the defendant asked for an instruction to the jury that "if you find that the plaintiff sent his wife to the defendant to collect money on the note, and the defendant gave to her his check of $50 as a payment on the note, and she accepted it as such payment and afterwards failed to deliver the check to the plaintiff, but took it or caused it to be taken to the bank, and procured her son to write the plaintiff's

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name on the back of the check, and either personally or through some other person collected the $50 on the check at the bank and failed to hand the money over to the plaintiff, then the defendant is entitled to credit on the note for the amount of the check."

This instruction was refused, and the defendant excepted, when without any objection or exception being taken by either party, and without argument, these questions of fact were submitted by the presiding judge to the jury.

"First, whether or not a check of $50 was given April 22, 1892, and I am going to ask you to answer that question yes or no, bearing in mind that what may be its worth, the burden is upon the defendant to establish that he gave it to a person who was authorized by the plaintiff, the holder of the note, to receive it on his behalf. Did the wife of the plaintiff go to this defendant and did this defendant give her a check for $50?"

"Second, on March 6, 1894, did the defendant give to the son of the plaintiff the sum of $20?"

Both of these questions were answered in the affirmative, but after these special findings had been made, no general verdict in favor of either party was ordered or returned, and no further action appears to have been taken. The record of the case thus fails to show that judgment can be entered for either party, or that the defendant is aggrieved by the refusal to give the ruling requested.

Until the case is ripe for final judgment, these proceedings therefore must be treated as purely interlocutory; and as the exceptions are prematurely entered in this court, they must be dismissed. *Safford* v. *Knight*, 117 Mass. 281, 283. *West* v. *Platt*, 124 Mass. 358. *Lowd* v. *Brigham*, 154 Mass. 107, 109, 110.

So ordered.

H. C. Joyner, for the defendant.
P. J. Moore, for the plaintiff.

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PATRICK J. McDONALD, administrator, *vs.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Berkshire. September 13, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Railroad. Evidence, Hearsay, Presumptions and burden of proof.

In an action against a railroad company under R. L. c. 111, § 268, for the loss of life of the plaintiff's intestate at a grade crossing, alleged to have been caused by the defendant's neglect to give the signals required by § 188 of the same chapter, if two witnesses who might have heard the signals testify that they were not given, and other witnesses, who were in such positions that if the signals had been given they easily might have heard them, testify that they did not notice the signals or do not remember them, there is evidence to justify a finding that the signals were not given.

At the trial of an action against a railroad company under R. L. c. 111, § 268, for causing the death of the plaintiff's intestate, a boy of seven and one half years of age, at a grade crossing, by a failure to give the signals required by law, a boy of about the same age who was coming home from school with the intestate when the accident happened, after testifying that he and the intestate did not run down a hill to see the train pass, testified that he told his father and mother about the occurrence and told them the truth about it that night. The defendant called the father and mother, who testified that their son told them that the plaintiff's intestate said "Let's run down and see the train go by," that they started on a run down the hill, that the intestate ran past him half way down the hill and got there before he did, and that he next saw him lying in the snow. *Held*, that the statement of the boy to his father and mother was not evidence of the truth of the things stated, being none the less hearsay because the boy testified that he told his father and mother the truth, and was competent only to impeach the boy's testimony by showing that he at other times had made statements inconsistent with his statement on the witness stand.

In an action against a railroad company under R. L. c. 111, § 268, for the loss of life of the plaintiff's intestate at a grade crossing of a highway caused by the defendant's failure to give the signals required by § 188 of the same chapter, if it appears that the required signals were not given, the plaintiff need only prove further that his intestate was killed by the train at the crossing. If the defendant relies upon gross negligence of the intestate as a defence, he must establish it by evidence.

TORT under Pub. Sts. c. 112, § 213, (R. L. c. 111, § 268,) for the loss of life of the plaintiff's intestate, a boy seven and one half years of age, at a grade crossing of the defendant's railroad in Cheshire on December 4, 1901, alleged to have been caused by the defendant's failure to give the signals required by Pub. Sts. c. 112, § 163, St. 1890, c. 173, (R. L. c. 111, § 188.)

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At the trial in the Superior Court before *Stevens*, J., the jury returned a verdict for the plaintiff in the sum of $1,800; and the defendant alleged exceptions, raising the questions stated in the opinion.

J. C. Crosby & J. F. Noxon, for the defendant.

T. F. Cassidy & P. J. Ashe, for the plaintiff.

BARKER, J. The defendant's train struck and killed the plaintiff's intestate, a schoolboy of seven and one half years of age, at a grade crossing, as the boy was going home from school about four o'clock of a winter afternoon. The action was in tort to recover for his death. At the trial the verdict turned upon the points whether the whistle was blown and the bell rung as required by the statutory provisions now embodied in R. L. c. 111, § 188, and, if not, whether the failure to give the signals contributed to the accident, and whether if the signals were not given the boy was guilty of gross negligence.

1. The first question argued upon the plaintiff's brief is whether there was evidence to justify a finding that the statutory signals were not given.

Fourteen or more witnesses testified on the point. Some of them, including the engineer and fireman of the train, testified positively that the whistle was blown and the bell rung; many others testified either that they did not notice or did not remember. Two witnesses testified positively that the whistle was not blown nor the bell rung. Some of the witnesses who testified that they did not notice the signals or did not remember were in positions where, if the signals had been given, the witnesses might be expected to notice them and to recall the fact.

In this state of the evidence the question whether there was a failure to sound the whistle and ring the bell as required by the statute was for the jury. It was not the case of a single person who testified that he did not remember as in *Tully* v. *Fitchburg Railroad*, 184 Mass. 499; or simply of several persons who testified either that they did not notice or did not hear, as in *Hubbard* v. *Boston & Albany Railroad*, 159 Mass. 320, 323. At least two witnesses who were so placed that they might have heard the signals if given took the responsibility of testifying that the signals were not given. See *Johanson* v. *Boston & Maine Railroad*, 153 Mass. 57, 59; *Lamoureux* v. *New York, New Haven, &*

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Hartford Railroad, 169 Mass. 338; *Walsh* v. *Boston & Maine Railroad*, 171 Mass. 52, 57. Others of the witnesses were in such positions that if the signals had been given the witnesses easily might have heard. *Menard* v. *Boston & Maine Railroad*, 150 Mass. 386. Their failure to hear or notice a signal was competent for the consideration of the jury. *Daniels* v. *New York, New Haven, & Hartford Railroad*, 183 Mass. 393, 396.

2. The bill of exceptions raises a question of evidence which it is well to consider before dealing with the other exceptions. The only count on which the case went to the jury was the one alleging the failure to give the statutory signals and was founded on the provisions now embodied in R. L. c. 111, § 268. It is settled that if the gross or wilful negligence of the person killed is relied on as a defence to such a count the burden of proving such negligence is upon the defendant. *Copley* v. *New Haven & Northampton Co.* 136 Mass. 6. *Walsh* v. *Boston & Maine Railroad*, 171 Mass. 52, 58. If the only reasonable conclusion to be drawn from the evidence is that the person killed was guilty of such negligence, or was engaged in committing an unlawful act, the judge should order a verdict for the defendant. See *Emery* v. *Boston & Maine Railroad*, 173 Mass. 136, 139.

It was not in dispute that the deceased came out of school shortly before the passing of the train, and started homeward over a highway leading first in a direction parallel with and not far from the railroad and then turning and leading over the crossing. He was in company with another schoolboy of about his own age whose route homeward was over the same crossing. When the deceased was struck by the train the two boys were within a few feet of each other. The boy who was in company with the deceased was a witness at the trial. The substance of his testimony was that the deceased and himself were together at first, and that on the part of the road which was parallel with the railroad the deceased ran ahead a little way and got past the witness and kept in advance to the crossing; that the witness was on the crossing when he saw the train coming and turned and went back; that he stood six or seven feet from the cars when the train went by; that as the witness turned and went back he did not see the deceased as he remembered, and that he did not remember that the deceased was ahead of or

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behind him as the witness came down toward the crossing, and that he did not remember that he saw the deceased again after the witness turned and went back; that he did not see the train strike the deceased; that while the train was passing the witness was looking down towards the depot, "about a minute," and then turned around and saw the deceased lying down on the snow bank beside the track; that he at the time of the trial was seven years of age and going on eight; that he and the deceased usually went home from the school together and that it was a frequent thing for this train to pass as they were going home; that the witness did not remember whether the deceased said anything when he started to run, that they did not hear the train and so did not run down, and that he did not remember whether the deceased or himself said anything. He further testified that at his home on the same night he told his father and mother about the occurrence, and that he told his father and mother the truth about it that night.

The father and mother were both called as witnesses by the defendant and their testimony tended to show that their son told them that he and the deceased left school together and started for home; that when they got to Bowen's Hill (on the road parallel with the railroad) they heard the train whistle and the deceased said — "Let's run down and see the train go by", and that they started on a run down the hill and the deceased ran past him midway of the hill and got down there before he did and he did not pay any more attention to the deceased until he saw him lying in the snow.

The jury were instructed that this testimony of the father and mother was not any affirmative evidence of what took place, and was competent only for the purpose of showing that at some other time the boy had made statements inconsistent with his statement made upon the witness stand and was not competent for the purpose of showing that the statement made to his father and mother was a true statement.

The defendant excepted to this part of the charge and now contends that the statement to the father and mother should be deemed evidence of the truth of the occurrence so stated.

We are of opinion that the instruction was correct. The testimony of the boy that he told his father and mother the truth

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about the occurrence that night, did not change the statements then made by him from hearsay. They were still declarations made without the sanction of an oath and with no opportunity for cross-examination by parties in interest. In *Jack* v. *Woods*, 29 Penn. St. 375, and in *Rothrock* v. *Gallaher*, 91 Penn. St. 108, the declarations considered were testimony given under oath in court in former trials, and were offered because of failure of mind on the part of the witness. See *Day* v. *Cooley*, 118 Mass. 524; *Brooks* v. *Weeks*, 121 Mass. 433, 435; *Manning* v. *Carberry*, 172 Mass. 432; *Knight* v. *Overman Wheel Co.* 174 Mass. 455, 466. See also *Commonwealth* v. *Piper*, 120 Mass. 185, 187, and cases cited.

3. The remaining contentions made upon the defendant's brief relate to the question whether, even if the statutory signals were not given, the plaintiff ought to have been allowed to go to the jury upon the evidence.

The defendant requested a ruling that the evidence was insufficient to warrant a finding for the plaintiff, which was refused, and also a ruling that if the deceased went upon the crossing without looking or listening for the train and was struck he was guilty of gross negligence. The latter request was not given in terms, but the jury were instructed that if the plaintiff's intestate heard the whistle of the train and ran or walked towards the crossing for the purpose of seeing the train go by and got so near the train as to be struck he was guilty of gross negligence, and they were also instructed in these words.

"If the plaintiff's intestate, before arriving at the crossing heard or saw the defendant's train approaching and went upon the crossing to see the train go by and was struck by the defendant's train, he was guilty of gross negligence and cannot recover. That is to say, Suppose this boy, seeing the train, knew it was coming, hearing the whistle or not hearing the whistle, went down for the purpose of seeing the train go by, under those circumstances you see the railroad could not be held responsible, because it could not be said in that case that the failure of the railroad to blow the whistle or ring the bell, contributed toward that accident."

If, as the jury must have found, the required signals were not given, all that the plaintiff was required to prove further was

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that the deceased was killed at the crossing by the train. The plaintiff need not show that the deceased was careful. If the defendant relies upon the gross negligence of the deceased that defence must be established by evidence. As the evidence stood no person saw the deceased struck or assumed to testify just how the accident happened. We think the question whether he was grossly negligent was for the jury. There was no direct evidence that he failed to look or listen for the train, and it cannot be said that upon the evidence there was no possible reasonable explanation of the accident save his gross or wilful negligence.

Exceptions overruled.

LEVERETT W. SPRING *vs.* INHABITANTS OF WILLIAMSTOWN.

Berkshire. September 13, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Way, Defect in highway. *Bicycle*. *Negligence*, Contributory.

A traveller on a bicycle may recover for an injury caused by a defect in a highway of such a character that the city or town would be liable for an injury caused by it to a traveller on foot or on horseback or in any vehicle of the usual kinds.

A near-sighted man wearing glasses, riding a bicycle without a lantern on a dark and rainy night, who undertakes to cross a bridge with which he long has been familiar, and which he has had an opportunity of knowing to be unguarded by a rail, without dismounting or slackening his speed, is not necessarily negligent in falling from the bridge into the stream below, and in an action against the town maintaining the bridge, alleging the lack of a guard rail as a defect in the highway, he may go to the jury on the question of his due care.

TORT for personal injuries alleged to have been caused by a defect in a highway of the defendant known as East Main Street, consisting of the lack of a railing on the southerly side of Walley Bridge. Writ dated October 26, 1899.

In the Superior Court the case was tried before *Hopkins*, J., who ordered a verdict for the defendant. The plaintiff alleged exceptions, which after the death of *Hopkins*, J. were allowed by *Lawton*, J.

R. Spring, for the plaintiff.

J. C. Crosby, for the defendant.

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BARKER, J. The action is for personal injuries sustained by a traveller riding on a bicycle, and the evidence tended to show that by reason of the lack of a guard rail on an approach of a bridge by which the way crossed a stream the traveller was thrown into the stream. It was admitted that there was no guard rail on the approach. The stream was some eleven feet below the floor of the bridge. It is not contended on behalf of the defendant that the absence of a guard rail could not be found from the evidence to have been a defect in the way. Neither does the defendant contend in terms that the fact that the plaintiff was riding a bicycle precludes him from maintaining the action. See *Richardson* v. *Danvers*, 176 Mass. 413; *Kenny* v. *Ipswich*, 178 Mass. 368; *Rust* v. *Essex*, 182 Mass. 313. As the defect was one for which the town would be liable in damages to a traveller passing over the way on foot or on horseback or in any vehicle of the usual kinds, we think that the fact that the plaintiff was travelling on a bicycle did not of itself justify the ordering of a verdict for the defendant.

It was admitted that the road and bridge were part of a highway and there was no question that proper notice was given as required by the statute. There was some dispute as to the exact place and manner of the accident, the defendant contending that the plaintiff ran into the end of the bridge structure and was thrown upon the road, but this plainly was a question for the jury. Therefore unless the evidence would not justify a finding that the plaintiff was in the exercise of ordinary care the case should have been submitted to the jury. The way was one with which the plaintiff long had been familiar, so that he had opportunity enough to know that there was no guard rail where the accident occurred. He seems to have carried no light upon his bicycle, and the night was dark and rainy. He was near-sighted and was wearing glasses. For a time he had ridden behind a wagon which carried a lantern at its rear, but not long before arriving at the bridge he had passed the wagon and gone on in advance of it. There was a street light not far from the bridge and another beyond it, but as he came near the bridge he went into a zone of darkness, and did not dismount or slow up until the accident occurred. The street light upon the other side of the bridge had been moved from the north to the south

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side of the road at some time before the accident, but it was not clear from the testimony that the position of that light had any effect upon the plaintiff in determining his course as he approached the bridge.

Upon all the evidence we think the question of the plaintiff's care or negligence was for the jury. The circumstances of the accident were not such as to make the plaintiff's knowledge, or opportunity for knowledge, of the absence of a guard rail conclusive evidence that he was negligent. The case is more analagous to *Kelly* v. *Blackstone*, 147 Mass. 448, and to *Norwood* v. *Somerville*, 159 Mass. 105, than to *Casey* v. *Fitchburg*, 162 Mass. 321. Nor was there any such lack of evidence as to the conduct of the plaintiff as was the case in *Wood* v. *Westport*, 185 Mass. 567. The darkness, the rain, the plaintiff's near-sightedness, his knowledge of the locality and his opportunity of knowing of the absence of the guard rail, in addition to the other circumstances disclosed by the evidence, made it a question of fact whether his conduct at the time was the reasonably prudent course of an ordinary man in like circumstances.

Exceptions sustained.

JOHN OBERTONI *vs.* BOSTON AND MAINE RAILROAD.

Berkshire. September 13, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Master and Servant. Negligence, Res ipsa loquitur. Railroad.

A brakeman and a flagman at a railroad crossing are not acting in the course of their employment when tossing a signal torpedo back and forth and afterwards leaving it on the crossing, where it is found by a boy who cracks it open and is injured.

The fact that a railroad signal torpedo is found on the planking of a railroad crossing does not in itself warrant the inference that it was left there by the servants of the railroad company in the course of their employment, and is not evidence of negligence on the part of the railroad company in an action brought against it by a boy eight years old, who found the torpedo on the crossing and was injured while cracking it with a rock.

TORT, by a boy eight years old when injured, for personal injuries caused by the alleged negligence of the defendant and

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its servants in leaving a signal torpedo on the public crossing of the defendant's railroad on Furness Street in North Adams, where it was found by the plaintiff, who, believing it to be harmless, took it home and cracked it with a rock, receiving the injuries alleged. Writ dated November 6, 1903.

At the trial in the Superior Court before *Maynard*, J., the jury returned a verdict for the plaintiff in the sum of $200; and the defendant alleged exceptions.

D. Malone, for the defendant.

J. H. Mack, for the plaintiff.

LORING, J. The evidence in this case warranted a finding that the plaintiff, a boy eight years of age, found a signal torpedo on the planking of the railroad, at a grade crossing of a highway; that he took it home and, not knowing the danger, cracked it with a rock and was hurt. In addition there was the testimony of one Paris that "a brakeman threw the torpedo to the flagman at the crossing and it dropped at his feet as he did not catch it; that the flagman threw it back to the brakeman and he did not catch it and the torpedo dropped to the ground"; that "after the train went by, the flagman went back to his covered station without picking it up."

The defendant contends that there was no evidence of negligence on its part, and we are of opinion that in this contention it is right.

The plaintiff's position is that if the story told by Paris was believed the defendant was liable, and he relies on *Harriman* v. *Railway Co.* 45 Ohio St. 11, in support of that contention, to which may be added the subsequent case of *Railway Co.* v. *Shields*, 47 Ohio St. 387, as cases of the highest court of another State.

But we are of opinion that if the torpedo came to and was left on the planking in the way testified to by Paris the defendant is not liable, and for the reason that the jury were not warranted in finding that the brakeman and flagman in throwing the torpedo back and forth and leaving it on the crossing were acting in the course of their employment. There is nothing in the evidence in this case, or in the common knowledge of mankind, as to railroad signal torpedoes, which would make it the duty of a brakeman to throw a torpedo to a flagman. All

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that was declared as to the use of railroad torpedoes in evidence in this case was that "signal torpedoes were used by railroads in signalling, being fastened upon the rails and containing an explosive." There was nothing in the evidence showing that it belonged to a flagman at a railroad crossing to signal trains by torpedoes or otherwise, much less is that within the common knowledge of mankind. If the use of railroad torpedoes is a fact within such common knowledge at all, the flagman has nothing whatever to do with signalling trains or with torpedoes. The case comes within the rule laid down in *Howe* v. *Newmarch*, 12 Allen, 49, which was applied in *Hankinson* v. *Lynn Gas & Electric Co.* 175 Mass. 271, and *Brown* v. *Boston Ice Co.* 178 Mass. 108. See also *McCarthy* v. *Timmins*, 178 Mass. 378.

The two cases from Ohio relied on by the plaintiff in the case at bar are entitled to great consideration as cases of the highest court of another State; but after a careful consideration of them, we are of opinion that they are not in accordance with the settled law of this Commonwealth and should not have been followed by the judge presiding at the trial.

The remaining question is whether the plaintiff was entitled to go to the jury on the fact that the torpedo was found on the planking.

A witness put upon the stand by the defendant contradicted the entire story told by Paris. That entitled the plaintiff to raise the question whether the presence of the torpedo on the planking was sufficient evidence that it was there through negligence on the part of the defendant or its servants, and that the defendant was liable on that ground if Paris's story was not believed. The case comes within *Cassady* v. *Old Colony Street Railway*, 184 Mass. 156, which goes on the same principle as *Winship* v. *New York, New Haven, & Hartford Railroad*, 170 Mass. 464, where the opposite conclusion was reached, and not within *Buckland* v. *New York, New Haven, & Hartford Railroad*, 181 Mass. 3, and *Galligan* v. *Old Colony Street Railway*, 182 Mass. 211.

But we are of opinion that the presence of the torpedo on the planking is not evidence which, by the common experience of mankind, justifies the inference that it would not have been there but for the negligence of the railroad or its servants in the

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course of their employment. The fact that it was a railroad signal torpedo warranted the inference that it was left on the crossing by some one who took it from the defendant railroad, but did not warrant the further inference that it came there through some negligent act of the defendant or of its employees, in the course of the business of the defendant. It is equally probable that it was taken from the railroad by a stranger, or by an employee for some purpose of his own outside his duty as an employee. The burden is on the plaintiff to prove that it came there by the act of the defendant or of its employees in the course of its business. We are of opinion that from its presence on the planking the jury were not warranted in inferring that it was there through the act of an employee done in the course of the defendant's business.

The nearest case where it has been held that such an inference could be drawn is the case where a pail of sand fell from a railroad bridge, coupled with evidence that no one was to be seen on the bridge immediately after the accident. *Lowner* v. *New York, New Haven, & Hartford Railroad*, 175 Mass. 166. The last case in which it was held that *res ipsa loquitur* did not apply was *Wadsworth* v. *Boston Elevated Railway*, 182 Mass. 572. Some of the earlier cases are collected in that opinion.

Under these circumstances it is not necessary to consider the other questions argued.

Exceptions sustained.

WILLISTON SEMINARY *vs.* EASTHAMPTON SPINNING COMPANY.

Hampshire. September 20, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Equity Jurisdiction, To reach and apply equitable assets. *Equity Pleading and Practice*, Intervening petition.

Where the funds of a corporation are in the hands of a receiver appointed in a pending suit in equity, a creditor of a creditor of the corporation cannot maintain an intervening petition to reach and apply to his claim any dividend which the creditor of the corporation named as respondent in the intervening petition may be entitled to receive from the funds in the hands of the receiver.

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PETITION TO INTERVENE in a pending suit in equity against the Easthampton Spinning Company, in which the petitioner is plaintiff, to reach and apply to the petitioner's claim against George H. Seeley, a creditor of that corporation, any dividend which Seeley may be entitled to receive from the receiver appointed in that suit.

The petitioner filed a motion to amend, and the respondent Seeley demurred to "the petition as amended."

In the Superior Court *Holmes*, J. made an order overruling the demurrer, and being of opinion that the interlocutory order so affected the merits of the controversy that the matter ought, before further proceedings, to be determined by this court, at the request of both parties, reported the case under R. L. c. 159, § 27, for such determination.

W. B. Farr, for the petitioner.

J. W. Mason, for the respondent Seeley.

BRALEY, J. The plaintiff claiming to be a simple contract creditor of the defendant, on December 16, 1898, brought in the Superior Court this bill in equity, which after alleging that the defendant was possessed of certain machinery in its factory, and of personal property "consisting of office furniture and stock, raw, wrought and in process of manufacture, located in said mills," included the further allegations that "said property has long been disused by the defendant and lies idle at the place aforesaid and is rapidly deteriorating in value"; that "the defendant gives no adequate care and attention to the property aforesaid but has neglected and abandoned the same"; "suits have been brought against said corporation . . . and said personal estate has been attached in said suits and the defendant pays no attention thereto and the same will soon mature into a preference by the lapse of four months whereby said attaching creditor will secure a great and inequitable advantage and other creditors will be greatly damaged"; and asked for the appointment of a receiver that these assets might be converted into money and applied in payment of the plaintiff's debt.

The usual preliminary proceedings were taken, and a temporary receiver appointed, whose appointment was subsequently made permanent. He took possession of the personal property of the defendant, which by his report appears to have been con-

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verted into money and forms a fund from which a dividend can be paid.

Other creditors upon notice appeared and made proof of debts, and among them came George H. Seeley, who presented a claim for a large amount, but as the receiver was of opinion that some of the items contained in the proof of debt were not correct he did not approve it, and so reported to the court, with a further statement that it had been assigned June 1, 1900.

Before this report was presented, on April 30, 1900, the plaintiff filed an intervening petition alleging that it was a creditor of Seeley, and setting forth the debt, averred that he was not a resident or citizen of this Commonwealth, or amenable to legal process, and except his claim against the defendant he had no property that could be reached by attachment, or otherwise, and praying that any dividend that ultimately might be payable to him should be applied in satisfaction of the debt he owed the petitioner. To this petition he entered a general appearance by counsel, and filed an answer denying any indebtedness, or that a case had been stated which entitled it to equitable relief.

November 7, 1900, on application of the receiver, a special master was appointed, under a decree afterwards enlarged, that required him to pass upon disputed claims of creditors and "upon all matters relating to the equitable trustee process", which must be construed to mean the issue raised by the intervening petition. Several hearings took place before him, but no report has been filed.

While the case as thus made up was pending under the reference, the petitioner asked leave to amend its petition by adding a new paragraph restating the account, and increasing the amount alleged to be due. To the petition as thus amended Seeley demurred, assigning nine causes of demurrer why the petition could not be maintained, and the demurrer having been overruled, the case was reported to this court under R. L. c. 159, § 27.

It is the petitioner's contention that the original bill is to be treated as a "creditors' bill as long known in chancery, seeking to have the property of the defendant corporation taken into the possession of the court which shall adjudicate upon the rights and priorities of the various creditors, and make a fair and equitable distribution of the assets among such creditors. . . . The

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relief sought is of such a nature that it must be regarded as a bill by one creditor in behalf of all the creditors to subject the property of the defendant to the claims of all the creditors, those claims to be equitably determined by the court of equity."

But this important question has not been argued, and we express no opinion upon it, as it is not open on the report.

The intervening petition, however, is a separate and distinct suit from the original bill, though filed in the same cause, and while it need not be as formal as a bill of complaint, it should set forth all the material facts on which the petitioner relies, and affirmatively show that the court has jurisdiction of the parties and the subject matter, and as the demurrer admits all its substantial allegations they must be taken as true, and the question to be determined is whether a case is stated which entitles the petitioner to the relief asked.

We find an embarrassment in dealing with the demurrer because the amendment is only a further specification of the debt for the purpose of properly establishing it before the master, and as its allowance rested solely in the discretion of the court, no jurisdictional question was involved. Neither does it appear that any order was made disposing of the amendment, and on the technical record alone the original petition stands unaffected by it. But as the parties, and the judge who made the report evidently considered that the demurrer was to the petition as amended, we adopt this course in our disposition of the case presented and argued.

If the petition can be maintained it must be treated as in the nature of an equitable trustee process, for the receiver before the decree of distribution had been entered could not be charged as trustee in an action at law against a creditor of the company, nor could the company be held as its property by a decree of the court was in the possession of the receiver. *Columbian Book Co.* v. *De Golyer*, 115 Mass. 67. *Phœnix Ins. Co.* v. *Abbott*, 127 Mass. 558. See Pub. Sts. c. 183, § 24.

While the dividend which ultimately may be declared and paid on the claim of Seeley is not in his possession or control, and he is entitled in common with other creditors to an accounting from the receiver, yet there is a clear distinction between a case where the property sought to be reached and applied is

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held by those who are under some contractual obligation to account for it to the debtor, and that where the possession and control is that of a tribunal established by law to convert it into money for the purpose of distribution among the creditors of the original debtor.

In the performance of this function neither the court, nor its representative, the receiver, is charged primarily with any duty to ascertain whether the petitioner is a creditor of any person who is entitled to share in such distribution, and to make payment to it in whole or in part of any dividend coming to its debtor. *Commonwealth* v. *Hide & Leather Ins. Co.* 119 Mass. 155. *Tuck* v. *Manning*, 150 Mass. 211.

It has been said that if a creditor has made an assignment of his interest in any dividend which may be coming to him, or liens have been created upon his interest in the fund held by the court, those who succeed to his rights are generally allowed to appear as claimants, and establish their claim to his share of the fund. *Tuck* v. *Manning*, *ubi supra.*

But with this exception creditors of a creditor as such have no corresponding right, and are not permitted to intervene.

The principal object of a receivership as a remedial agency when used by our courts in bills in equity by judgment creditors, and bills brought under R. L. c. 159, § 8, cls. 7, 8, is to afford prompt and efficient relief, and this might in many instances be seriously impaired, if not destroyed, if the privilege of intervening was held to include a class of creditors to whom the petitioner belongs. If this privilege is extended to them it would delay the determination of causes, and lead to unnecessary and prolonged litigation, and increased expense in the winding up of estates which are being marshalled, and cause delay to those entitled to a speedy and final settlement of the accounts of receivers, and payment to them of their share of the estate of the debtor.

As the petitioner shows no claim to the fund which he seeks to reach except the bare fact that the proving creditor is its debtor the demurrer must be sustained, and the petition dismissed.

Decree accordingly.

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FRANK E. ALDRICH & another *vs.* BAY STATE CONSTRUCTION COMPANY.

Franklin. September 20, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Contract, Construction. *Option*. *Agency*. *Evidence*, Of value. *Words*, "Either", "Take."

The rule of construction, that the language of an instrument in writing in case of doubt is to be construed against the party using it, is not to be resorted to where the intention of the parties otherwise appears.

In an action of contract for the price of street railway ties furnished to a construction company, it appeared, that the defendant offered to buy the ties from the plaintiff, paying in cash a price less than that asked by the plaintiff, or paying him the full price in the stock of either of two street railway companies, the G. & T. or the D., at the plaintiff's option. The plaintiff replied in a letter that he would sell the ties at the full price and "take stock in either the G. & T. or D. roads." The ties were delivered and the plaintiff demanded payment in G. & T. stock, which the defendant refused, claiming the right to pay him in stock of the D. road, which the plaintiff refused to receive. *Held*, that the plaintiff's letter did not necessarily mean that the defendant might pay him in either of the two stocks at its option, but might be found to mean, that the plaintiff would take his pay in the stock of one or the other of the two roads as he might elect, in accordance with the defendant's offer.

Where it appears at a trial that a contract was made by an oral offer accepted by a letter, the presiding judge may give his construction of the letter with reference to the circumstances which the evidence tends to establish as existing when it was written, and leave to the jury the question whether the existence of those circumstances has been established by the evidence.

The purchasing agent of a construction company, who has authority to buy street railway ties for the corporation and agrees to pay for them in the stocks of two street railway companies, may be found to have authority to agree to pay for the ties wholly in one of the stocks rather than the other.

On the question of the value of the stock of a corporation, if there have been no sales of the stock and therefore there can be no possible evidence of ordinary market value, *semble*, that the treasurer of the corporation, who also is the president of another corporation owning shares of the stock, may be allowed to testify that in his opinion a fair market value of the stock would be its par value of $100 a share.

CONTRACT for the price of street railway ties sold and delivered to the defendant. Writ in the District Court of Franklin dated April 20, 1904.

On appeal to the Superior Court the case was tried before *Fox*, J., who ruled and refused to rule as stated in the opinion.

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The jury returned a verdict for the plaintiffs in the sum of $458.73; and the defendant alleged exceptions.

W. A. Davenport, for the defendant.

B. H. Winn, for the plaintiffs.

BARKER, J. The plaintiffs having street railway ties for sale were called upon by the defendant's purchasing agent who offered them a price less than they asked and also offered to pay in stock of either of two railway companies. The defendant admits that the offer of payment in stock was an offer to allow the plaintiffs the choice as to the company whose stock they should take. At the interview no bargain was made, the purchasing agent going away to ascertain whether the defendant would pay the price asked, and the partner who had acted for the plaintiffs to ascertain whether they would take pay in stock. After a few days the plaintiffs on April 20, 1903, wrote:

"Mr. Allen and I have decided to let you have the electric ties you saw the other morning, at 22¢ each down to 4 in. face, loaded on the cars at So. Vernon. Will take stock in either the Greenfield and Turners Falls or Deerfield roads. Please let me hear at once if this is all right.

"Respectfully,

"Allen & Aldrich."

In reply the defendant wrote as follows:

"Your letter relating to ties has been received and I think we can use your ties as per your agreement. Will you kindly let me know when you intend to load these ties and be sure and load them in as large cars as possible and put in full loads. Please ship the first car to Greenfield consigned to the Bay State Construction Co.

"Yours very truly,

"Bay State Construction Co."

The ties were delivered without further communication between the parties, and at the trial the defendant agreed that it received them, that they were satisfactory and that the number of ties and the price stated in the plaintiff's declaration were correct. On July 6, the plaintiffs went to the defendant's office and by an oral bargain sold the defendant more ties at the same rate. Whether on this occasion they told the defendant's purchasing agent that they wanted the Greenfield and Turners

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Falls stock, and that he replied "All right" was in dispute upon the evidence, and also whether on the same occasion the defendant's president said that the letter called for Deerfield stock and the plaintiffs assented and told him how to make out the certificate. It was not in dispute that the ties sold on July 6 were delivered nor that the charges for them in the declaration were correct.

Before suit was brought the defendant sent by mail to the plaintiffs four shares of stock in the Greenfield and Deerfield Railway Company and a check for $38.02 and the stock and check were returned. After the suit was brought a legal tender of the stock and of the amount of money for which the check was drawn with interest and costs was made and the stock and money so tendered were duly brought into court and the tender was pleaded by the defendant as its defence to the action.

At the trial the defendant asked the judge to rule that by the letter of April 20 the plaintiffs gave to the defendant the option of delivering either stock. The judge refused to give the ruling and instructed the jury that the letter did not necessarily mean that the option was to be exercised by the defendant. The exception to this refusal to rule and to the contrary instruction given raises the principal question in the case.

The defendant contends that when the true meaning of a written instrument is doubtful it must be construed most strongly against the person using the doubtful language. This doctrine is sometimes applied in favor of a party who has been misled into advancing money. See *Barney* v. *Newcomb*, 9 Cush. 46, 56. But it should be applied only in the last resort, when all other rules of construction fail. *Boston* v. *Richardson*, 13 Allen, 146. Our first duty is to put ourselves in the place of the parties to the instrument and then to read it giving to its words their plain and ordinary meaning in the light of the circumstances and in view of the subject matter, the acts of the parties and their relations to each other. *Farnsworth* v. *Boardman*, 131 Mass. 115.

The plaintiffs had for sale railway ties and were asking for them twenty-two cents apiece. They were not in the business of buying stocks. The defendant was not a stock broker dealing in options, but a construction company, buying ties and offering

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the plaintiffs for certain ties twenty-one cents apiece, but wanting to know what they would sell for and take pay in one of two stocks, the plaintiffs to have their choice between the two. The parties separated, the plaintiffs to determine whether they would take stock in payment and the defendant to determine whether it would pay the rate asked. The plaintiffs decided to take stock as offered and the defendant to pay the price asked, and under these circumstances the letter was written and received and its offer accepted by a reply which said nothing as to the particular stock to be used in payment.

According to the talk the option to take either stock was in the plaintiffs. To make a valid contract on the only lines under consideration by both parties nothing more was necessary than for the plaintiffs to agree to take stock in payment and for the defendant to assent to the price demanded. The performance of such a contract, but not its making, would involve the choice by the plaintiffs of one of the two stocks. If upon the interchange of the letters the option was in the defendant instead of in the plaintiffs a new term had been imported into the proposed bargain. If the language used so meant, such would be the legal result of the letter and the reply, but not otherwise.

To show that such is the meaning of the plaintiffs' letter the defendant quotes as a definition of the word "either" the words "one or the other of two, taken indifferently", while the dictionary to which reference is made adds "or as the case requires." Common definitions of the word are "one of two", "the one or the other." But the word when used in a connection which implies a choice of action on the part of the person using it indicates that the option is in the person who is to do the act involving the choice. It is the person who is to take one of two apples who may take either apple.

> "spirits when they please,
> Can either sex assume, or both;" *

So with the word "take." While it may be used in a passive sense, as "to receive", or "to accept", its more usual and ordinary meaning is in an active sense "to procure", "to make selection of", "to choose." It is not until the circumstances under

* Milton's Paradise Lost, *Book 1, lines 423, 424.*

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which the letters were written are disclosed by outside evidence that the words "Will take stock" are shown to have connection with the sale of the ties, and to designate a way of liquidating the debt to arise if the plaintiffs' offer should be accepted. The language used is not "You may pay in stock of either road", but "Will take stock in either the Greenfield and Turners Falls or Deerfield roads", that is to say in either one or the other. The action promised is action on the part of the plaintiffs. Giving to the language used that one of its usual plain and ordinary meanings which is pointed out by the situation and purpose of the parties, the legal meaning of the letter is to offer to sell ties at a rate stated, for payment in one of two named stocks, the one so to be used to be selected by the plaintiffs, and not by the defendant. We think therefore that the ruling requested, that the letter gave the defendant the right to deliver either stock was wrong, and that the instruction that the letter did not necessarily mean that the option was to be exercised by the defendant was right, so far as it went. As the evidence stood it would have been wrong to apply the rule of construction now contended for by the defendant. See *Bascom* v. *Smith*, 164 Mass. 61, 76.

As there was evidence that before the certificates for Greenfield and Deerfield stock were sent the plaintiffs made known their election to take payment in the other stock the ruling requested that upon all the evidence the defendant was entitled to a verdict was wrong for the reason already stated, as well as for another. Some of the ties were sold on July 6, and it was admitted that they were delivered and that the prices charged were correct and that they were not paid for unless in the Greenfield and Deerfield stock. But the plaintiffs' evidence tended to show that at the time of that sale they said they would take the other stock and that that statement was assented to by the purchasing agent. If so the plaintiffs had a clear right to a verdict in respect of the ties sold on July 6. The evidence was abundant that the purchasing agent had authority at that time to make the bargain which the plaintiffs testified then was made.

The defendant now contends that it was the duty of the judge to construe the letter and not leave it to the jury as a question

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of fact. No exception is specifically directed to this phase of the case.

The judge did construe the letter and gave it a construction contrary to that for which the defendant contended. We think that the course pursued followed as near as might be that approved in *Bascom* v. *Smith*, *ubi supra*, of undertaking to construe the contract with reference to all the circumstances which the evidence tended to establish as existing when it was made and leaving it to the jury to determine whether the circumstances assumed had been established by the evidence. As was said in *Bascom* v. *Smith* "This is not leaving the whole construction of a written contract to the jury."

There was contradictory evidence as to what occurred on July 6. At that time neither party had attempted to designate to the other which of the two stocks should be used in the payment. The plaintiffs' evidence tended to show that they then said to the purchasing agent, who then bought of them the second lot of ties that they would take the Turners Falls stock and that the agent replied "All right, I will send it to you." The defendant's evidence tended to show that the defendant's president said that the contract called for Deerfield and Northampton stock and that the plaintiff assented to that and told the officer to have the stock delivered and how to make out the certificates. The judge instructed the jury in substance that whatever the effect of the negotiations between the parties had been before that time, that if there was an agreement either way on July 6, that agreement by way of modification of the original contract would govern. To this instruction the defendant excepted, and now contends that it was wrong because the authority of the purchasing agent was limited to the buying of ties and did not extend to the modification of contracts. The bill of exceptions does not show that the question of the purchasing agent's authority was raised at the trial. However this may have been, he then could buy ties for stock and we think the evidence discloses sufficient authority for him then to bind the defendant to pay in either stock for the ties first sold as well as for those then sold.

The same person who was the president of the defendant construction company held also the office of treasurer in each of the

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street railway companies. There had been no sales of stock of the Turners Falls Company. Under these circumstances the judge admitted his answer to the question what in his opinion would be the fair market value of the stock, that he should call it $100 per share. The bill of exceptions does not show that either this question or the answer given were excepted to, although it shows an exception to evidence of value on a certain date. We think the evidence was properly admitted, in the absence of any possible evidence of ordinary market value.

The remaining contentions of the defendant are as to the amount of the recovery as affected by the value of the stock, by the time of demand and by interest. The only evidence as to the value of the stock being that the market value and par value were the same, and there being sufficient evidence in our opinion to justify the jury in finding a demand of payment, the instructions excepted to were right.

Exceptions overruled.

FELIX WESOLOSKI *vs.* ANTHONY WYSOSKI.

Franklin. September 20, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Sale. Conversion.

Where there is an agreement for the sale of a specific article and something remains to be done, as weighing or measuring it, and there is no evidence tending to show an intention that the title should pass before the weighing or measuring is performed, the weighing or measuring is a prerequisite to the passing of the title. Approving the rule stated in *Riddle* v. *Varnum*, 20 Pick. 280.*

In an action for the conversion of certain onions, it appeared, that onions are sold by weight and before weighing have to be screened to separate them from the husks and from those onions which are too small to be merchantable, that the plaintiff owning certain onions, which were stored in a warehouse, agreed to sell them to the defendant at a certain price per bushel when they were screened and weighed, and that the defendant agreed to screen the onions with the plaintiff's help and also pay for them on a certain day, that, after the day agreed upon,

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* In the present case the screening of the onions was more than a weighing or measuring, and resembled a separation from a mass, as the small onions had some value although not merchantable as onions.

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the plaintiff finding the onions at the warehouse unscreened told the defendant not to take them. Whereupon the defendant said that he had sold the onions, and the next day screened and weighed the onions and shipped them away. *Held*, that the screening and weighing of the onions were prerequisites to the passing of the title, so that no title had passed to the defendant when the plaintiff rescinded the contract, and that the sale of the onions by the defendant before they were screened and weighed was in itself a conversion without a demand and refusal.

TORT for the conversion of certain onions in the manner described in the opinion. Writ in the District Court of Franklin dated February 26, 1904.

On appeal to the Superior Court the case was tried before *Fox*, J. The plaintiff on his redirect examination testified as follows: "Anthony Wysoski was going to screen the onions, I was going to help him. He told me he would come up and take me down and help him screen them, that he would come after me to come down and help him screen them. He didn't come. On Feb. 21st I told Tony, 'Tony don't take my onions, because you don't pay what you agreed to, don't take my onions, because you don't take them at the right time when you agreed to.' Tony told me he had sold my onions, I said, 'how can you sell my onions because you didn't pay for them when you agreed to?'"

The defendant requested the following rulings: "1. That upon all the evidence the plaintiff is not entitled to recover in this action. 2. If the jury find that the defendant bought the onions of the plaintiff at an agreed price, and was to take possession of the same on the following Monday, screen same, measure same up and pay for same, and the defendant on the following Monday took possession of the onions and started to screen them and sold them, then the plaintiff cannot recover in this action. 3. Before action is maintained it is necessary for the plaintiff to show a demand and refusal. 4. There is no sufficient evidence to show any demand upon the part of the plaintiff. 5. If the jury find that no title passed to the defendant on Monday, Feb. 8, 1904, the plaintiff cannot recover in this action."

The judge refused to rule as requested and gave the instruction to the jury which is stated in the opinion. The jury returned a verdict for the plaintiff in the sum of $335.04; and the defendant alleged exceptions.

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B. H. Winn, for the defendant.

W. A. Davenport, for the plaintiff.

LORING, J. This is an action for the conversion of three hundred and three bushels of onions. There was evidence that the plaintiff stored some onions in a warehouse in the fall of the year 1903, and that on February 6, 1904, he made a contract with the defendant by word of mouth for the sale of them to him at eighty cents a bushel, when they were screened and weighed. It was admitted that onions are sold by weight, fifty-two pounds making a bushel; that they shrink while in store over winter, and also that small onions are not sold as onions and were not included in the contract of sale in question. For these reasons it was necessary in the case at bar to screen and weigh the onions. Onions are screened by being run over a horizontal screen which lets the husks and small onions fall through, leaving the merchantable ones above. There was evidence that by the agreement in the case at bar the onions were to be screened, weighed and paid for on Monday, February 8, following the Saturday when the agreement of sale was made. On February 20, the plaintiff found that the onions had not been screened and weighed. Thereupon he notified the defendant not to proceed further in the matter. The defendant answered that he had sold the onions, and the next day he screened and weighed the onions and they were shipped away.

The jury were told in the language of the opinion in *Riddle* v. *Varnum*, 20 Pick. 280, that where there is an agreement for the sale of a specific article and something remains to be done, as weighing or measuring it, and there is no evidence tending to show an intention that the title should pass before the weighing or measuring is performed, the weighing or measuring is a prerequisite to the passing of the title; but that it is a fact for the jury in each case where there is evidence to that effect, whether the title was to pass before the weighing or measuring was performed. That was correct. The rule laid down in *Riddle* v. *Varnum* is the settled law of the Commonwealth. See *Sherwin* v. *Mudge*, 127 Mass. 547, where the subsequent cases are collected. In *Richmond Iron Works* v. *Woodruff*, 8 Gray, 447, relied on by the defendant, it was held that on the evidence it was the intention of the parties that the title should pass without

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the further act being performed. The rule laid down in *Riddle* v. *Varnum* was not questioned in that case.

The conversion relied on was the sale by the defendant before the onions were screened and weighed. That was a conversion in itself without a demand and refusal. It is necessary only to refer to *Robinson* v. *May*, 163 Mass. 212, and *Baker* v. *Lothrop*, 155 Mass. 376, where the earlier cases are collected.

For these reasons the presiding judge was right in refusing to give the five rulings requested by the defendant.

Exceptions overruled.

HOLYOKE ENVELOPE COMPANY *vs.* UNITED STATES ENVELOPE COMPANY.

Hampden. September 27, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Assignment. Contract, Construction. *Pleading, Civil*, Variance. *Vendor and Purchaser.*

On August 18 of a certain year a corporation made a bill of sale to a new corporation, for a round sum of money, of all its stock in trade and "all its business and good will as a going concern," with a provision that the business should be considered as belonging to the purchaser from and after December 31, of the previous year. "Accounts receivable" before the beginning of the current year were excepted from the property assigned. Unexpired insurance policies on the property were delivered to the purchaser when the papers passed. These were cancelled on August 18, and return premiums were received thereon which were credited on new policies issued to the purchaser. *Held*, that the insurance policies on hand at the close of the previous year were not sold to the purchaser as included in the round price, and that on an accounting between the selling and purchasing corporations the seller was entitled to credit for the pro rata value of the policies from the end of the previous year to August 18, when the bill of sale was delivered and accepted, it having been shown that it is customary to allow pro rata value in place of surrender value when new insurance is taken out through the same agency. *Held, also*, that a previous contract giving the purchaser the option to purchase the property, which it exercised, and providing that the seller should keep the property insured during the period of option, did not change the rights of the parties in this regard.

When an item in an account annexed does not describe accurately the claim relied upon, so that an objection on that ground taken at the trial would have been sustained, but where nevertheless the item describes the subject matter of the

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claim sufficiently to give the defendant information of its character, and the defendant has not suffered from the inaccuracy of the description, the plaintiff may be allowed to recover on the count without amendment.

The rule, that in case of a decree for the specific performance of a contract for the sale of land the vendee is entitled to the profits from the day when the deed was to be delivered and the vendor is entitled to interest on the purchase money from the same date, has no application to a contract for the purchase of real estate and personal property, together with a going business taking it from a date more than seven months before, for a round sum in cash which was paid before the day named for payment.

CONTRACT for an alleged breach of an agreement in writing. Writ dated December 16, 1899.

In a decision reported in 182 Mass. 171 this court sustained a demurrer to the declaration, leaving it open to the plaintiff to apply to the Superior Court for leave to amend.

The following statement of the case as it came before the court at its present stage, on exceptions alleged by the plaintiff to findings made and refused in the Superior Court by *Maynard*, J., sitting without a jury, is taken from the opinion of the court:

After the decision of this court when this case was before it on demurrer, the declaration was amended twice, and the case came on for hearing before a judge sitting without a jury. The plaintiff asked the judge to make three findings of fact. Without dealing with these specifically the judge made a general finding in favor of the defendant, and the case is here on an exception to that finding and to his refusal to make the three findings asked for.

It appeared that the plaintiff gave to Messrs. Dean and Shibley a written option dated January 14, 1898, to sell to them or their appointees its real estate, machinery, stock in trade and "all its business and good will as a going concern," for a sum to be ascertained by appraisal and to be paid in cash on delivery of proper conveyances. The option was to be exercised and the amount to be paid fully determined on or before April 30, the purchase money was to be paid on or before September 1, and on completion of the sale it was agreed that the plaintiff's business "shall be considered as belonging to the purchaser from and after December 31st, 1897, and all proper accountings and adjustments shall be made accordingly." The time within which the option was to be exercised and the amount of the purchase money to be paid fully determined was subsequently

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changed from April 30 to June 30. The defendant corporation was chartered some time in the month of June, 1898. On or before June 22, Messrs. Dean and Shibley exercised their option and, by a written contract made on that day, it was agreed that the time within which the amount to be paid as purchase money was to be fully determined should be extended to July 15. By a later contract dated July 27, it was agreed that the purchase money should be $615,000 in cash and preferred stock in the defendant corporation to the amount of $43,000 at par. On August 12 a vote was passed by the directors of the defendant company that their corporation, as the appointee of Dean and Shibley, purchase the property of various corporations and firms described in certain deeds and bills of sale then presented to them; among these corporations was the plaintiff. On August 18 the plaintiff executed a deed and bill of sale by which it conveyed and assigned to the defendant corporation its real estate and personal property and delivered the deed and bill of sale to Messrs. Dean and Shibley, and they in turn delivered them to the defendant as their appointee. Thereupon Messrs. Dean and Shibley paid the plaintiff $723,800, being the $615,000 in cash plus the $43,000 in preferred stock agreed upon on July 27, plus ten per cent thereof which by the agreement was to be paid to Messrs. Dean and Shibley for their services.

The plaintiff and the defendant then entered into an accounting as to the business which had been sold and assigned to the defendant by the plaintiff, and which (by the terms of the bill of sale as well as by the terms of the agreement between the plaintiff and Messrs. Dean and Shibley) it was provided "shall be considered as belonging to the purchaser from and after December 31, 1897, and all proper accountings and adjustments shall be made accordingly." On October 31, 1898, the defendant paid the plaintiff $31,799.45 due it under the accounting. This was received by the plaintiff without prejudice and reserving to itself a right to sue the defendant to recover four items claimed by it to be due, for which the defendant denied liability. This action was accordingly brought.

Before the trial the plaintiff waived all but two of the four items. The two insisted upon at the trial were first, a claim to be paid interest at six per cent on the $723,800, the amount of

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the purchase money, from December 31, 1897, to August 18, 1898, and second, a claim for the value of the unexpired insurance to the credit of the Holyoke Envelope Company on January 1, 1898, amounting to $807.87, with interest to September 23 inclusive, $35.82, making in all $843.69.

E. H. Lathrop, for the plaintiff.

C. L. Long, for the defendant.

LORING, J. [After the foregoing statement of the case.] 1. We are of opinion that as matter of law the judge was not warranted in finding for the defendant on the items as to unexpired insurance.

At the trial the president of the plaintiff corporation testified that the second item was the pro rata value of the unexpired insurance from December 31, 1897, to the termination of the policies in force on that day; that this insurance had been paid for by the plaintiff before December 31, and the policies were handed to the defendant when the deed and bill of sale were delivered on August 18. On his cross-examination it appeared that the pro rata value had been estimated by a clerk, but this witness testified, from his knowledge of the amount of insurance then on the property and of the rate of the insurance, that the estimated amount was substantially correct; that the amount of insurance then on the property was $300,000; that his recollection was that the policies matured in September, and he remembered that when the bookkeeper gave him the figures on this item he, knowing these data, computed in his head the amount due; that the amount was substantially correct. At the original hearing the officers of the defendant corporation denied having received these policies, but in a supplemental agreement it is stated that since the hearing it had been ascertained that the policies were delivered to the defendant's attorney when the papers were passed, and were in turn delivered by him to the insurance broker who was attending to the defendant's insurance on the property then taken over, and at the attorney's request were cancelled on August 18; that on their cancellation the broker received return premiums amounting to $324.81, and new policies were issued to the defendant for which the insurance broker paid, using the amount of the return premiums in part payment. It appears from the bill of exceptions that the case finally was

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submitted to the judge on this supplemental agreement, as well as on a prior agreement and on oral testimony.

The defendant's first contention is that the evidence failed to show an express adoption by the defendant of the agreement between the plaintiff and Messrs. Dean and Shibley; that in addition the judge was not bound as matter of law to find that the defendant knew of the terms of that agreement, and for these reasons the plaintiff had not as matter of law brought itself within the decision of this court in 182 Mass. 171. But the agreement that the business conducted with the property covered by the deed and bill of sale delivered August 18, 1898, was to be considered as the business of the defendant from December 31, 1897, and that all proper accountings and adjustments were to be made accordingly, was set forth in the bill of sale which ran directly from the plaintiff to the defendant as well as in the option given by the plaintiff to Messrs. Dean and Shibley. The bill of sale to the defendant as well as the option to Messrs. Dean and Shibley is counted on in what is termed in the record the third amended declaration, which we assume was the second count on which the plaintiff went to trial. The liability of the defendant to pay for the insurance if it was carried in conducting the business during the period in question is made out by the acceptance by the defendant of this bill of sale, and it was not necessary to resort to an implied adoption by the defendant of the agreement between the plaintiff and Messrs. Dean and Shibley.

The insurance in question was in fact carried in conducting the business to be accounted for as the business of the defendant during the period beginning December 31, 1897, and ending August 18, 1898. Had it been paid for during that period in the absence of any further agreement on the subject it would have been a payment which would have been allowed as made in the course of that business. The fact that it had been paid for by the plaintiff in advance before the period began is of no consequence in determining which of these two parties is ultimately to bear the burden of it unless this unexpired insurance was a portion of the personal property sold and assigned to the defendant by the plaintiff, for which (together with the real estate) it was paid $723,800. That is to say, unless the unex-

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pired policies of insurance to the value of $807.87, on hand on December 31, 1897, stood on the same footing as stock in trade to that amount, and, like stock in trade then on hand, were paid for by the $728,800 purchase money. As matter of description it does not seem to come within the personal property assigned by the bill of sale. Moreover it partakes of the character of what is excepted from the personal property assigned, to wit, "accounts receivable prior to January 1, 1898," by which we understand is meant accounts receivable due in respect of business done before January 1, 1898. It appears that on January 1 the plaintiff took an account of stock, and by the terms of the bill of sale it was to pay its debts and liabilities existing on December 31, 1897, out of the property not covered by the assignment. The intention (not very clearly expressed) seems to have been that all the results of the business done before January 1, 1898, except stock on hand, should not pass to the defendant. Cash on hand at the close of business is not specifically excepted, but it is not included within the description of what is assigned. The same is true of the unexpired insurance. The value of unexpired insurance properly is taken as an asset in making up the condition of a business adventure on a specified day. We are of opinion that in the case at bar the policies of insurance on hand at the close of business on December 31, 1897, were not sold to the defendant, and that the defendant was bound to credit the plaintiff with the pro rata value thereof for the period in question, to wit, the period from December 31, 1897, to August 18, 1898.

The defendant's next defence on this item is to invoke in its support a clause in the option given by the plaintiff to Messrs. Dean and Shibley dated January 14, 1898. In that contract, after providing that, pending performance of the contract, the plaintiff should maintain its plant and general equipment in as good and efficient running order and repair, fire and other accident excepted, as the same now are, it is stipulated also that, pending such performance, the plaintiff should "keep its plant and stock at all times well insured in a total of at least two hundred and seventy-five thousand (275,000) dollars, and, in case of loss, that it will transfer to said purchasers the moneys collected on account of such loss or claims therefor in lieu of

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the property damaged or destroyed, provided this contract is accepted and its conditions fully carried out by said Dean & Shibley." The contention is that the sum paid for insurance under this clause is a sum which by this covenant the plaintiff was bound to expend, and for that reason the burden of it is ultimately to be borne by it.

Without stopping to discuss the right of the defendant to invoke in its support one of the terms of a contract to which it insists it was not a party, it is enough and it is more satisfactory to dispose of the contention by pointing out that the effect of the clause in question is not what the defendant contends it to be. Under the prior clauses of this contract it had become the duty of the plaintiff to carry on the business until it was ascertained whether the option would or would not be exercised, having regard to the possibility that it might have to account for the business so carried on as carried on for the purchaser; fire and other accidents were excepted from the covenant to maintain the plant and general equipment in good and efficient running order and repair. The covenant in question then follows. Its effect was not to throw on the plaintiff the ultimate burden of what but for this covenant (as we already have seen) would be borne by the purchaser in the event which has happened, but to regulate and make certain what should be done by the plaintiff in respect to insurance during the period in question. In our opinion this covenant did not change the rights of the parties and shift on to the plaintiff the burden of paying for the insurance carried in conducting what is now to be adjusted as having been the defendant's business.

The next objection taken is, first, that the value of the insurance for the period between December 31, 1897, and August 18, 1898, was not proved, and that is all that can be recovered under this count in the declaration; and, second, that although a case is made out for the recovery of the $324.81, in the supplemental agreement for the cancellation of the policies on August 18, 1898, that sum cannot be recovered under the pleadings in this action.

But the cost of the insurance between December 31, 1897, and August 18, 1898, was proved if it is assumed that the basis on which $324.81 was computed to be the amount of the return

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premiums for the period between August 18 and the expiration of the policies was the same as that on which it was testified to in behalf of the plaintiff that $807.87 was the value of this insurance for the whole period from December 31 until the policies expired. The cost of insurance while the business was carried on for the defendant is the difference between these two sums, namely, $483.06. Having regard to the uncontradicted testimony of the plaintiff that it is customary to be allowed pro rata value in place of surrender value in case new insurance is taken out through the same agency, we are of opinion that this assumption must be made. It follows that the plaintiff was entitled to recover under this count of the declaration $483.06, with interest from January 1, 1898, and the exception to the finding in favor of the defendant on this item must be sustained.

This brings us to the question of pleading raised by the defendant. Had the second count on which the plaintiff went to trial (termed in the record third amended declaration) been the only count in the declaration, this objection would have been well taken. That was a count on the contract contained in the bill of sale by which the business carried on between December 31, 1897, and August 18, 1898, was to be accounted for as the business of the defendant. The plaintiff's claim here is to be paid $324.81 because the defendant accepted an assignment of these policies on August 18, 1898, that is, on the expiration of that period, has had them cancelled and collected this sum of money as their value. This $324.81 cannot be recovered under that count. But there was also what is termed in the record the second amended declaration. That we assume was the other count on which the plaintiff went to trial. It is a count on an account annexed, and one of the items in the account annexed is "Unexpired insurance to credit of Holyoke Envelope Company, January 1, 1898, $807.87. Interest January 1, 1898, inclusive, to September 23, inclusive, $35.82," making $843.69. The only difficulty in the way of the plaintiff's recovering this claim under this count of the declaration is that the item in the bill of particulars does not accurately describe the transaction. To describe the transaction properly the item should have been for return premiums received on cancellation of policies of insurance assigned to the defendant on August 18, 1898, with interest

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from that day. Had it been contended at the trial that the bill of particulars did not properly describe the claim proved, the objection would have had to be sustained. But this item in the bill of particulars in a way includes the insurance in question, although it does not accurately describe the transaction which gave rise to the right to recover this $324.81 as money had and received to the plaintiff's use. It is apparent that no injury was suffered by the defendant from the inaccuracy of description. The case was held open until it had had an opportunity to investigate the facts, and the result of its investigation was submitted to the court in the supplemental agreement. Under these circumstances we are of opinion that the objection of pleading is not well taken.

2. The other item remains to be disposed of. We are of opinion that this claim of the plaintiff is wholly without merit.

The plaintiff's contention here is based on the rule that the vendee must pay interest on the purchase money in cases like *Sanders* v. *Bryer*, 152 Mass. 141. That is to say, when specific performance of a contract for the sale of land is decreed and by the terms of the contract payment was to be made upon delivery of the deed, the vendee is entitled to the intervening profits between the day when the deed should have been delivered and the day it is delivered, and the vendor is entitled to interest on the purchase money for the same period. This result is reached on the ground that the conveyance ought to have been made at the earlier day and in equity the rights of the parties will be enforced on that basis, namely, by carrying into effect what would have ensued if that had been done which ought to have been done. That has no application to the case now before us, where the $723,800 was to be paid on or before September 1, 1898, and was paid on August 18, 1898, and where by the terms of the contract the thing bought by this payment was not only the real estate and the personal property but the business since December 31, 1897.

Exception sustained to the findings on item 3 of the bill of particulars annexed to the account annexed, and on item 3 of the bill of particulars annexed to the third amended declaration.

Exception to the finding on item 2 of the bill of particulars of both counts overruled.

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HERBERT W. COOLEY *vs.* GEORGE W. COLLINS & trustee.

Hampden. September 27, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Evidence, Best and secondary, Presumptions and burden of proof, Self-serving statements. *Landlord and Tenant.*

There is no error in the admission of secondary evidence of the contents of a document, which the party introducing the evidence has given the adverse party no notice to produce, where the document is not one which the adverse party would be expected to have in his possession and he does not show that he could have produced it if he had received notice to do so.

In the absence of evidence on the subject there is no presumption that a lease was executed in duplicate, and, if there is evidence that a certain lease is in the custody of the lessee who is not within reach of the process of the court, a presiding judge may allow the introduction of secondary evidence as to the contents of the lease without the party introducing it calling for its production by the lessor, a deponent in the case, especially where the lessor has testified in his deposition that the instrument alleged to be a lease was merely an agreement that a former lessee might sublet to the alleged lessee.

Where, in an action on a covenant in a lease for rent, the defendant denies liability on the ground that the plaintiff and his predecessor in title accepted other persons as tenants in place of the defendant and collected rent from such other persons, the plaintiff may show that the plaintiff's predecessor and the plaintiff in collecting rent from such other persons acted for the defendant and continued to treat the defendant as tenant of the premises liable for the rent.

In an action for rent, where the defendant contends that the plaintiff accepted another person as tenant in his place, and the plaintiff contends that he still held the defendant liable as tenant and in collecting rent from the other person acted as the defendant's agent, the plaintiff cannot put in evidence his own account book to show to whom he credited the rent collected.

CONTRACT on a covenant in a lease for rent. Writ dated January 24, 1908.

At the trial in the Superior Court before *Hitchcock*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

The portion of the deposition of Frissell mentioned in the opinion, and held to have been excluded erroneously, was as follows:

"Int. 18. When you gave receipts personally, from whom did you acknowledge receipt of payment of the rent? Ans. It was my opinion that I gave receipts in George W. Collins' name,

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that is my best recollection." "Int. 25. State as nearly as you can recollect the conversation which you and George W. Collins had? Ans. I can't remember it exactly. Int. 26. Don't you know what you and Collins talked about? Ans. As I remember it, he came to me when he sold out to the Springfield man and wanted me to sublet it to the Springfield man and as I recollect, I refused but told him I would give him permission to sublet it to him. Int. 27. Is the talk you have mentioned in the last answer the conversation you had with Collins as near as you can remember it? Ans. That is as near as I can remember it now." "Int. 34. Did you deal with Collins, or his son as your tenant? Ans. His son paid the rent. Not as my tenant as I remember. Gave the receipts in George W. Collins' name."

C. T. Callahan, for the plaintiff.

A. L. Green, for the defendant.

BARKER, J. On August 10, 1899, the defendant and one Frissell, the plaintiff's predecessor in title, executed a lease for the term of three years from August 11, 1899. On May 1, 1901, Frissell conveyed the leased property to the plaintiff. The action is to recover unpaid rent from March 10, 1902, to August 10, 1902.

The case was tried with a jury and after a verdict for the defendant comes here upon exceptions taken at the trial to the admission and exclusion of evidence.

1. The evidence tended to show that the premises were first occupied by the defendant personally, and then by one Deming to whom the defendant sold out his business; that Deming in turn sold out to the defendant's son who upon his purchase occupied the premises, and that afterward they were occupied in turn by Haskell and Hastings, Haskell and Blanchard, and C. W. Haskell, until vacated in June, 1902, and that at the time of the plaintiff's purchase the actual occupation was by the defendant's son who bought out Deming.

One defence relied on was that during Deming's occupancy the original lessor and then owner Frissell had with the assent of the defendant made a new lease directly to Deming of the premises for the then unexpired term of the original lease. Oral evidence of this lease to Deming was admitted subject to the

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plaintiff's exception. He now contends that evidence of the contents of the lease was inadmissible because the defendant had given the plaintiff no notice to produce the original document, and, Frissell's deposition having been taken by the plaintiff, had not asked Frissell to produce the Deming lease or to testify concerning it, and because there was no sufficient proof of its loss.

It did not appear where Deming was at the time of the trial and he was not called as a witness. The evidence tended to show that when Deming bought out the defendant Deming came up to Holyoke from Hartford, Connecticut, and remained on the premises some six or seven weeks when he sold out to the younger Collins. The defendant testified that all he knew about Deming was that when he bought the business he came from Hartford, and that he had made inquiries in Holyoke concerning the whereabouts of Deming but had received no information.

As the Deming lease was not a document which the plaintiff would be expected to have in his own possession and as the bill of exceptions does not state that the plaintiff claimed that he could have produced it if he had received notice so to do, the fact that no notice to produce it had been given did not make the secondary evidence inadmissible. Neither did the defendant's omission to put cross interrogatories to Frissell asking him to annex it to his deposition. So far as appears the lease was not in duplicate and was given to Deming. In fact Frissell in answer to direct interrogatories addressed to him by the plaintiff in his deposition and also in answer to cross interrogatories propounded by the defendant had in substance testified that, at the place and on the occasion when the defendant testified the deponent Frissell had given the lease to Deming, he had signed some paper which embodied his then agreement with the defendant as to the leased premises, he testifying that it was an agreement that the defendant might sublet to Deming.

The question whether the situation was such as to make secondary evidence of the contents of the instrument admissible was for the court. *Donelson* v. *Taylor*, 8 Pick. 390. *Page* v. *Page*, 15 Pick. 368. We do not find in the bill of exceptions anything to show that the decision of the presiding judge to

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admit the secondary evidence was wrong. He fairly might infer that Deming had the custody of the document and that he was not within reach of the process of the court.

2. Some parts of Frissell's deposition were excluded against the plaintiff's exception, which in our opinion should have been admitted. The twenty-fifth, twenty-sixth and twenty-seventh interrogatories called for conversations between the deponent and the defendant. We see no ground for excluding these questions and answers. "'What a party says' observes Mr. Justice Parke, 'is evidence against himself, as an admission, whether it relates to the contents of a written paper, or to anything else.'" *Loomis* v. *Wadhams*, 8 Gray, 557, 562, and cases cited.

3. The defendant's contention being that he was not liable because either Frissell or the plaintiff, or both, had accepted other persons than the defendant as tenants and had collected rent of them as such tenants, this made admissible evidence that Frissell and the plaintiff had in fact continued to treat the defendant and not the actual occupants of the premises as tenants liable for the rent. *Whicher* v. *Cottrell*, 165 Mass. 351. For this reason we think that the testimony of Frissell in answer to the eighteenth interrogatory, that he gave receipts in the defendant's name, and the testimony offered that the plaintiff himself, although he collected rent from the occupants, invariably made out his bills and receipts in the name of the defendant, should have been admitted.

4. The plaintiff's account book was not admissible to show to whom he credited the payments of rent and was properly excluded.

As some evidence offered by the plaintiff was wrongly excluded the verdict must be set aside and there must be a new trial.

Exceptions sustained.

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JOSEPH MEEHAN *vs.* HOLYOKE STREET RAILWAY COMPANY.

Hampden. September 27, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Employer's liability, duty to warn, assumption of risk. *Evidence*, Opinion: experts.

It is not the duty of a street railway company, employing a lineman to assist in stringing a feed wire cable on its poles, to instruct or warn him that while he is grasping the cable in adjusting it on the arm of a pole it may slip from the pins intended to hold it and go off the arm carrying him with it.

A lineman who has been employed in stringing a feed wire cable on poles for more than two weeks, during which time three miles of the cable have been strung, if injured while at work in moving the cable from one pin to another on the arm of a pole from the cable slipping off the arm and carrying him with it, there being nothing to show that the method adopted in moving the wire differed from that previously adopted in stringing the other poles, cannot hold his employer liable for injuries thus caused on the ground that the method was an improper one, as ordinary care would have given the lineman knowledge of the danger incidental to the process, so that he must be presumed to have appreciated it and by continuing to work to have accepted the risk.

The opinion of one of large experience in stringing wires on poles and in moving and repairing such wires, if this is sufficient to qualify him as an expert, is not admissible to show the proper manner of moving a feed wire cable on the arm of a pole, or that a particular manner of doing this is improper, the process of stringing such a cable on the arms of poles erected to support it being so plain and simple, and so well within the scope of common observation and knowledge, as not to be a proper subject for expert testimony.

TORT, by a lineman, for injuries alleged to have been incurred while obeying the order of one Connors, a superintendent of the defendant, to assist in moving a feed wire cable from the inner to the outer pins on the arm of a pole of the defendant at the corner of Bridge Street and Canal Street in Holyoke, the cable, while the plaintiff was grasping it, slipping over the outer pin and going off the pole carrying with it the plaintiff, who was standing with one foot on the rail of the platform on the top of a tower wagon and the other foot on the brace supporting the arm. Writ dated August 15, 1902.

At the trial in the Superior Court *Lawton*, J. ordered a verdict for the defendant; and the plaintiff alleged exceptions.

R. P. Stapleton & W. H. McClintock, for the plaintiff.

W. H. Brooks & W. Hamilton, for the defendant.

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BRALEY, J. The plaintiff rests his right to recover on the ground that the defendant's negligence consisted either in putting him to work in a dangerous place without warning him of the danger to which he was exposed, or in moving the wire by an improper method.

We assume in our decision of the case there was evidence for the consideration of the jury, that Connors was intrusted with and exercised superintendence over the plaintiff at the time of the accident. *Knight* v. *Overman Wheel Co.* 174 Mass. 455.

But to find the defendant liable for a failure to give proper instructions the danger must have been such that the plaintiff would be presumed to have been ignorant of it. There were no concealed risks, and whatever danger there was arose from the possibility of falling, while handling the wire, from the place where he was required to work. Neither was he being urged in his work so that it fairly could be contended that his attention was distracted by a command, on which he would have a right to rely as a possible excuse to relieve him from the imputation of negligence.

It appears that when the cable was firmly drawn and ready to be adjusted, the order was given to the plaintiff to "help . . . lift the wire over." To do this he knew that it would be necessary for him to stand on the platform of the tower wagon, which was just underneath the arm on which the cable rested, and from this position he then voluntarily placed himself with one foot on the brace which supported the arm on that side of the pole, and the other foot on the rail attached to, but two feet higher than the platform, and while taking hold of the arm with his left hand he grasped the cable with his right hand to help lift it over the inner pin so that it could be set in the groove of the insulator on the outside pin and tied.

He also must have known something of its weight and the strain to which it was subjected, for he had helped to place it in position upon the top of the arm, and the fact that at this point of the line, and nearly at a right angle with its former course, there was a sharp turn in the direction in which the cable was to be extended, which might make it more difficult of attachment to the arm, was a matter of common observation. The physical requirements of his work did not prevent him from re-

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leasing his grasp, nor was he required by any order, or from the nature of his employment, to retain it, when by so doing his personal safety might be put in peril. If the cable was sufficiently slackened, it was plainly apparent that its weight would be likely to cause it to fall, and in taking the position assumed by him, he could easily have perceived that if from any cause the cable was not held securely until fastened to the pin, it would recoil, and if he then retained his grasp he might be thrown to the ground. As all these conditions were open and visible no instructions at this time would have afforded to him any further information as to the nature of the work, or the way in which it was to be performed, than that which he possessed already, and the defendant owed no duty to instruct, where instructions were unnecessary. *Downey* v. *Sawyer*, 157 Mass. 418. *Stuart* v. *West End Street Railway*, 163 Mass. 391, 393.

Under the second claim of liability, the plaintiff argues that he had a right to have this issue submitted to the jury.

If some other way than the simple process finally used to place the cable in position would have been better, and more safe, yet the plaintiff had been assisting in putting up the cable for more than two weeks before the accident. During this time about three miles of wire had been strung, and his testimony discloses that he was substantially familiar with the manner in which it was raised and attached to the arms of the poles, and there is nothing to show that the method employed to adjust it to the arm of this pole differed from that previously followed.

The acting superintendent was using a method already in use by the defendant, and with which the plaintiff was familiar. If he considered the way in which the work was being done unsafe, he was not obliged to continue in its employment as a lineman, but if he chose to go on, he accepted that way, with whatever risk attached to it. *Goodes* v. *Boston & Albany Railroad*, 162 Mass. 287, 288.

Although he also testified that he was not told, and that he did not know, that it was dangerous to move the cable from one pin to the other, yet under the circumstances he cannot be excused from the exercise of ordinary care which would have given him such knowledge, and must be presumed to have ap-

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preciated any danger incidental to the process. *Moulton* v. *Gage*, 138 Mass. 390. *Lothrop* v. *Fitchburg Railroad*, 150 Mass. 423, 425. *Goldthwait* v. *Haverhill & Groveland Street Railway*, 160 Mass. 554, 556. *Sullivan* v. *Simplex Electrical Co.* 178 Mass. 35. *Lodi* v. *Maloney*, 184 Mass. 240. *Gavin* v. *Fall River Automatic Telephone Co.* 185 Mass. 78.

The remaining exception relates to the exclusion of the evidence of a witness called by the plaintiff, who from his large experience in stringing, moving and repairing similar wire, was asked to give his opinion of what would be the proper way to move the cable, and whether the method adopted was improper.

Even if it is conceded that the witness was qualified to give an opinion, this evidence was excluded properly. Where the issue to be tried involves technical or mechanical knowledge not commonly understood, such evidence is admissible to enable a jury to draw correct inferences, and to form a reliable judgment of the effect of the testimony, but the process of stringing a cable wire on the arms of poles erected to support it is so plain and simple that it is well within the scope of common observation and knowledge, and can be intelligently comprehended by a jury without the aid of opinion evidence. *Oliver* v. *North End Street Railway*, 170 Mass. 222. *Flynn* v. *Boston Electric Light Co.* 171 Mass. 395. *Edwards* v. *Worcester*, 172 Mass. 104. *Spillane* v. *Fitchburg*, 177 Mass. 87. *Gibson* v. *International Trust Co.*, *ante*, 454.

As the plaintiff has failed to prove any act of negligence on the part of the defendant his exceptions must be overruled.

So ordered.

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FRANK S. MASON *vs.* CHARLES L. GARDNER, executor.

Hampden. September 27, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Gift, Donatio causa mortis. Bills and Notes, Delivery.

A promissory note of the donor cannot be made the subject of a *donatio causa mortis.*

A woman three days before her death signed two instruments in the form of promissory notes, payable on demand after her demise, and concluded each with the words "and I hereby charge my individual property and estate with the payment of this note." She placed these instruments with her bank books and other documents in the pocket of a skirt belonging to her and had the pocket sewn up. She retained control of the skirt but at night intrusted it to the payee of one of the notes, to be taken upstairs away from the open window, with the understanding that upon her death the whole package was to be delivered to the person named in her will as executor. *Held,* that the instruments, which were bad as promissory notes for want of a consideration, also were void for want of delivery, and, even if they had been good and there had been a delivery, such instruments could not be made the subject of a *donatio causa mortis.*

CONTRACT on two alleged promissory notes described in the first paragraph of the opinion. Writ in the District Court of Western Hampden dated July 11, 1901.

On appeal to the Superior Court the case was tried before *Maynard,* J., who, at the close of the plaintiff's evidence, ordered a verdict for the defendant. The plaintiff alleged exceptions.

H. Fuller & R. J. Morrissey, for the plaintiff.

J. B. Carroll & W. H. McClintock, for the defendant.

BARKER, J. The plaintiff's mother and the plaintiff himself were distant relatives of the defendant's testatrix. She died on Thursday, June 8, 1899, leaving a will, made some little time before, in which she had made no provision in favor of the plaintiff or his mother. On June 5 the testatrix signed her name to two instruments of that date, one of which promised to pay the plaintiff on demand after her demise the sum of $300, and the other of which contained a like promise to pay $500 to the plaintiff's mother. Each instrument also concluded with these words, "and I hereby charge my individual property and estate with the payment of this note." On July 11, 1901,

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the plaintiff's mother assigned to him by a writing the instrument promising to pay the $500, and on the same day the plaintiff brought this action seeking to recover the amounts named in the two instruments of June 5, 1899.

At the jury trial the plaintiff's mother, the plaintiff and a physician testified as witnesses, and, at the close of the plaintiff's evidence, the judge ruled that upon the evidence the plaintiff was not entitled to recover, and the case is here upon the plaintiff's exception.

We have carefully examined the statement of the evidence in the bill of exceptions and are of the opinion that the ruling was right.

Instruments like those in suit cannot be the subject of a valid *donatio causa mortis*. *Parish* v. *Stone*, 14 Pick. 198. Therefore to entitle the plaintiff to recover the evidence which he contended should be submitted to the jury must be such as to justify a finding that the promises of the testatrix were made upon legal consideration.

It would not be enough to justify a verdict for the plaintiff merely to produce evidence which would justify a finding that the deceased made the instruments to change in favor of the plaintiff's mother and himself the disposition of the deceased's property contained in the will which she previously had executed. *Parish* v. *Stone*, *ubi supra*. Nor would it be enough merely to introduce evidence that the promises were made because the promisees had been kind and friendly in their treatment of the promisor, and that she gave the promises to compensate them for services which they had rendered to her on the footing of friendship merely and without the intention of charging or receiving payment. Nor is the question the same which would have arisen if the plaintiff, after his formal proofs and placing the instruments themselves in evidence, had rested his case. He saw fit to go farther and to put in evidence all the circumstances of the promisor and of his own and his mother's intercourse with and relations towards her, and all that was said and done by the promisor in relation to the making of the instruments and to their custody down to and after her death. The ruling to which the plaintiff excepted was made upon all this evidence, and it cannot successfully be attacked if upon an

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examination of the whole case there is no substantial evidence that the instruments were made upon a valuable consideration, or no substantial evidence that there was a complete delivery of them on the part of the promisor. *Hillyer* v. *Dickinson*, 154 Mass. 502.

In the first place it seems to us to be plainly and conclusively proved by the testimony of the plaintiff himself, by that of his mother, and by that of the physician, that at the time when the instruments were made the promisor owed neither of the promisees any debt, and that neither of the promisees had ever rendered her any services on the footing of expected payment, or on any footing other than that of intimate friendship, save that some years before the plaintiff had painted the testator's house and had received for his work and materials full payment in money.

In the next place the testimony of the plaintiff's mother, who alone was present when the instruments were signed, and who alone knew of their existence and of the facts concerning their whereabouts down to the time of the death of the promisor, seems to us to show plainly that there was no delivery of the instruments by the promisor. She had them placed with her bank books and other documents of her own in the pocket of a skirt belonging to herself, had the pocket sewn up, and intrusted the skirt and its contents as her own and to be kept for her during her life, to the plaintiff's mother only at night, that it might be taken upstairs away from the open window, and with the understanding that the whole package was upon her death to be given up to the person named in her will as executor.

Because we think that the only reasonable inference to be drawn from the whole of the evidence as it is disclosed to us is that there was no legal consideration for the promises contained in the instruments sued on, and no delivery of them by the promisor in her lifetime, we hold that the ruling was right.

Exceptions overruled.

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DAVIS H. YOUNG *vs.* CITY OF CHICOPEE.

Hampden. September 27, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Contract, Implied: common counts. *Sale.*

A contract with a city, for the repair of a wooden bridge forming part of a highway, provided that the timber and other woodwork of the carriage way, wherever decayed, should be replaced by sound material, the contractor to be paid a certain sum per thousand feet for new material wrought into the bridge, and that no work should be begun until material for at least one half of the repairs contemplated should be "upon the job." Complying with this condition, the contractor distributed lumber "all along the bridge" and upon the river banks. While the work was proceeding the bridge and the lumber upon it were destroyed by fire. *Held*, that the city was not liable for lumber thus destroyed which had been distributed for use in the work but not wrought into the bridge, its liability being confined to paying for such portion of the work and materials as had become identified with the bridge at the time of its destruction.

CONTRACT for labor and materials furnished in repairing a wooden bridge totally destroyed by fire while the work was proceeding. Writ dated November 24, 1903.

At the trial in the Superior Court *White*, J. refused to rule that the defendant was not liable for the loss of material upon the bridge or its approaches which had not been wrought into the structure at the time of the fire.

The jury returned a verdict for the plaintiff in the sum of $1,312.43. The defendant alleged exceptions, wherein it was stated, that if the plaintiff could recover in any form of action for the materials furnished but not wrought into the bridge, and consumed by fire, judgment was to be entered on the verdict, but, if the plaintiff was not entitled to recover for such materials, judgment was to be entered for the plaintiff in the sum of $584.77.

L. White, for the defendant.

T. D. O'Brien, for the plaintiff.

HAMMOND, J. This is an action to recover for work and materials furnished under a written contract, providing for the repair of a wooden bridge forming a part of the highway across the Connecticut River. While the work was in progress the

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bridge was totally destroyed by fire without the fault of either party, so that the contract could not be performed.

The specifications required that the timber and other woodwork of the carriage way, wherever decayed, should be replaced by sound material securely fastened, so that the way should be in a "complete and substantial condition." As full compensation both for work and materials the plaintiff was to receive a certain sum per thousand feet for the lumber used "on measurements made after laying and certified by both engineers," or, in other words, the amount of the plaintiff's compensation was measured by the number of feet of new material wrought into the bridge. That the public travel might not be interfered with more than was reasonably necessary, the contract provided that no work should be begun until material for at least one half of the repairs contemplated should be "upon the job." With this condition the plaintiff complied, the lumber, which at the time of the fire had not been used, being distributed "all along the bridge" and upon the river banks. Some of this lumber was destroyed by the fire.

At the trial the defendant did not dispute its liability to pay for the work done upon and materials wrought into the structure at the time of the fire; (*Angus* v. *Scully*, 176 Mass. 357, and cases there cited;) and the only question before us is whether it was liable for the damage to the lumber which was distributed as above stated and had not been used.

It is to be noted that there had been no delivery of this lumber to the defendant. It was brought "upon the job" and kept there as the lumber of the plaintiff. The title to it was in him and not in the defendant. Nor did the defendant have any care or control over it. No part of it belonged to the defendant until wrought into the bridge. The plaintiff could have exchanged it for other lumber. If at any time during the progress of the work before the fire the plaintiff had refused to proceed, the defendant against his consent could not lawfully have used it. Indeed had it not been destroyed it would have remained the property of the plaintiff after the fire. Nor is the situation changed, so far as respects the question before us, by the fact that the lumber was brought there in compliance with the condition relating to the commencement of the work. This condition manifestly was in-

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serted to insure the rapid progress of the work, and it has no material bearing upon the rights of the parties in relation to the lumber. It is also to be borne in mind in this connection that the compensation for the whole job was to be determined by the amount of lumber wrought into the bridge.

The contract was entire. By the destruction of the bridge each party was excused from further performance and the plaintiff could recover for partial performance. The principle upon which the plaintiff can do this is sometimes said to rest upon the doctrine that there is an implied contract upon the owner of the structure upon which the work is to be done that it shall continue to exist, and therefore, if it is destroyed, even without his fault, still he must be regarded as in default and so liable to pay for what has been done. *Niblo* v. *Binsse*, 1 Keyes, 476. *Whelan* v. *Ansonia Clock Co.* 97 N. Y. 293. In *Butterfield* v. *Byron*, 153 Mass. 517, 523, it was said by Knowlton, J. that there was "an implied assumpsit for what has properly been done by either [of the parties], the law dealing with it as done at the request of the other, and creating a liability to pay for it its value." In whatever way the principle may be stated, it would seem that the liability of the owner in a case like this should be measured by the amount of the contract work done which, at the time of the destruction of the structure, had become so far identified with it as that but for the destruction it would have enured to him as contemplated by the contract.

In the present case the defendant, in accordance with this doctrine, should be held liable for the labor and materials actually wrought into the bridge. To that extent it insured the plaintiff. But it did not insure the plaintiff against the loss of lumber owned by him at the time of the fire, which had not then come into such relations with the bridge as, but for the fire, to enure to the benefit of the defendant as contemplated by the contract. The cases of *Haynes* v. *Second Baptist Church*, 88 Mo. 285, and *Rawson* v. *Clark*, 70 Ill. 656, cited by the plaintiff, seem to us to be distinguishable from this case.

The exceptions therefore must be sustained and the verdict set aside. In accordance with the terms of the statement contained in the bill of exceptions, judgment should be entered for the plaintiff in the sum of $584 damages, and it is

So ordered.

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HENRY E. RICE *vs.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Worcester. October 4, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence. Railroad.

In an action by a railroad mail clerk against a railroad company for injuries from being squeezed between two mail cars while attempting to alight at a station of the defendant, it appeared, that the mail cars were built without the usual outside end platforms and had no platform gates, that the plaintiff had been a railroad mail clerk for ten years on the same route and for a year and a half in cars of the same type, that on each side of the mail cars were side doors with grab irons and iron stirrups, the end doors being designed for passing from the mail cars to the ordinary cars, and that the plaintiff in leaving the train by the narrow opening between the two mail cars was compelled to force his body through a space only thirteen or fourteen inches wide between two upright planks, knowing that this space was likely to be narrowed at any instant to a width of only two or five inches, when the cars should be brought forcibly together upon the changing of engines customary at this station. *Held*, that, assuming that the plaintiff was a passenger, and assuming also, without deciding it, that the absence of end platforms and platform gates on a postal car is a violation of R. L. c. 111, § 214, and thus was evidence of negligence on the part of the defendant, the plaintiff's attempt to leave the train by forcing his body through the narrow space between the planks at a time when it was to be expected that the cars would be brought nearer together in the process of changing engines was negligence on the part of the plaintiff contributing to his injuries.

TORT, by a railroad mail clerk in the employ of the United States, for injuries from being squeezed between two mail cars while attempting to alight from a train of the defendant at its station in Worcester. Writ dated December 4, 1903.

At the trial in the Superior Court *Gaskill*, J. at the close of the plaintiff's evidence ordered a verdict for the defendant, and reported the case for determination by this court. If the ruling was right judgment was to be entered on the verdict; otherwise, a new trial was to be granted.

F. H. Stewart, for the plaintiff.

R. A. Stewart, for the defendant.

BARKER, J. We assume that the plaintiff as a postal clerk employed by the post office department of the general government upon the defendant's train stood to the carrier in the gen-

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eral relation of a passenger,* although that relation was modified to some degree by the circumstances that his position and movements in the postal cars and his leaving or returning to those cars, and the internal arrangement and use of those cars and of the appliances and utensils within them designed to facilitate the care and disposition of the mails, were not in the control of the defendant, but of the postal officials and employees.

We assume also, without so deciding, that the presence in the train of postal cars of the construction described in the evidence, built without the usual outside end platforms and having no platform gates as required by R. L. c. 111, § 214, was an infraction of that statutory requirement, and so some evidence of negligence on the part of the defendant.

But we are of the opinion that the verdict properly was ordered for the defendant on the ground that the plaintiff himself was guilty of contributory negligence.

He had been a railroad mail clerk for ten years on the same route and for a year and a half in cars of the same type, and must be taken to have been entirely familiar with the method of managing the train at the station, and with the construction of the cars, and with all possible modes of leaving or entering them. On each side of the mail cars were side doors with grab irons and iron stirrups. The end doors of the mail cars were designed to afford a way of passing from the mail cars to the ordinary cars. The train was run with two locomotives, and the plaintiff knew that these were to be changed at the station, and he must be taken to have known that the changing of engines would involve the forcing nearer together of the two mail cars, in the process of uncoupling and coupling the engines during the stoppage of the train.

As the postal cars were built, leaving the train by the narrow opening between the two compelled the plaintiff to force his body through a space only thirteen or fourteen inches wide, between two upright planks, and which space he must be taken to have known was liable to be narrowed at any instant without warning to a width of only two or five inches, when the two

* A similar assumption was made in *Stoddard* v. *New York, New Haven, & Hartford Railroad*, 181 Mass. 422.

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postal cars should be brought together in the changing of locomotives.

There was no unusual exigency and no special demand for haste on the part of the plaintiff. To attempt to leave the train by forcing his body through the narrow space between the planks at a time when it was to be expected that the cars would be brought nearer together in the process of changing engines was negligence on the part of the plaintiff, contributing to his injury.

Judgment for the defendant on the verdict.

JOSEPH E. CARTIER *vs.* WALKER ICE COMPANY.

Worcester. October 4, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Contributory.

An employee of an ice company, managing the switch of an ice run so carelessly that it is struck and broken by a block of ice and injures him by coming against his ankle, cannot recover from his employer for the injuries.

TORT for personal injuries from being struck by a switch, alleged to have been fastened insufficiently, while employed in switching ice on a run connected with an ice house of the defendant at North Pond in Worcester. Writ dated February 7, 1903.

At the trial in the Superior Court before *Gaskill*, J., it appeared, that the plaintiff was employed by the defendant on the day of the accident, and, after working a short time upon the ice in the pond, was directed to tend a certain switch which, according to the way it was turned, either sent the ice directly into the ice house or allowed it to go down the run; that the plaintiff had worked at this particular switch in four or five previous years while the defendant was harvesting ice; that the cakes of ice weighed about two hundred pounds each; that the plaintiff, having been at the switch about half an hour and having sent about six cakes directly into the house, intended to allow the next one to go past him and down the run, and with that in-

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tention pulled the switch toward him, and had drawn it as far as the middle of the run, when it was struck by a cake of ice with such force that the nut which held the switch came off the bolt and the switch itself came off, striking the plaintiff on the ankle and causing the injuries.

At the close of the plaintiff's evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

W. I. McLoughlin, J. A. Thayer & C. B. Perry, for the plaintiff.

W. Thayer, H. W. Cobb & F. A. Walker, for the defendant.

HAMMOND, J. The direction to the jury to return a verdict for the defendant was right. Without reciting the evidence in detail, it is plain that the carelessness of the plaintiff in the management of the switch was the cause of the accident, and the jury would not have been warranted in finding otherwise.

Exceptions overruled.

INHABITANTS OF BROOKFIELD *vs.* INHABITANTS OF WEST BROOKFIELD.

Worcester. October 4, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Pauper. Municipal Corporations. Waiver.

Semble, that under Pub. Sts. c. 84, § 28, (R. L. c. 81, § 32,) the written notice, which the overseers of the poor of a town are required to give when demanding from another town the removal of a pauper, may be signed by only one of the overseers if the others authorize or ratify his action.

An answer of a town under Pub. Sts. c. 84, § 29, (R. L. c. 81, § 33,) to a notice from another town demanding the removal of a pauper, refusing the demand on the ground that the pauper's settlement is in the demanding town, waives the right to object to the notice for insufficiency.

By Pub. Sts. c. 84, § 29, (R. L. c. 81, § 33,) the overseers of the poor of a town are empowered to act for the town in making a written answer or statement signed by one or more of them to a notice from another town demanding the removal of a pauper, and therefore can waive the right of the town they represent to object to the notice for insufficiency.

CONTRACT for $100 expended by the town of Brookfield, for the support of a pauper alleged to have a settlement in the town

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of West Brookfield, from September 4, 1901, to March 31, 1902. Writ in the District Court of Western Worcester dated March 9, 1903.

On appeal to the Superior Court the case was tried before *Gaskill*, J., without a jury. He found for the plaintiff in the sum of $104.35; and the defendant alleged exceptions.

C. M. Rice, for the defendant.

H. E. Cottle, for the plaintiff.

LORING, J. This is an action to recover for the support of a pauper. The only defence now insisted upon is that the notice sent by the plaintiff was not a sufficient notice within Pub. Sts. c. 84, § 28, in that it was signed by one of the overseers and that the statute requires that written notice shall be given by the overseers. The case is here on an exception to a refusal to direct a verdict for the defendant.

We do not stop to consider whether, taking the whole notice in connection with the subsequent correspondence and action, it ought not to be taken to have been sent originally or subsequently adopted by the overseers and so was a sufficient notice within the statute, for we all are of opinion that it is not open to the defendant to set up the objection.

The notice given was sent to the proper persons, namely, the overseers of the poor of the defendant town, and an answer was sent signed by one of the overseers of the defendant town stating that the pauper's settlement was in the plaintiff town and on that ground refusing to accede to the request made.

Before the case of *Commonwealth* v. *Dracut*, 8 Gray, 455, it had been held in several cases that the objection of an insufficient description of the pauper was waived by an answer of no settlement. *Embden* v. *Augusta*, 12 Mass. 307. *Shutesbury* v. *Oxford*, 16 Mass. 102. *Northfield* v. *Taunton*, 4 Met. 433. Following this rule, it was held in *Commonwealth* v. *Dracut*, 8 Gray, 455, where it does not appear in what respect the notice was insufficient, that in case of an answer of no settlement the defendant could not object to the sufficiency of the notice. The case at bar comes within those decisions.

The defendant's argument is that the overseers of the defendant town cannot waive the rights of the town. But by Pub. Sts. c. 84, § 29, the overseers are empowered to act for the town in

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this respect, and it has not been suggested that the evidence did not warrant a finding that the written statement which was signed by one of them was not in fact the act of the overseers of the defendant town. We are of opinion that such a finding was warranted by the evidence.

Exceptions overruled.

MANDEL BLOCK *vs.* CITY OF WORCESTER.

Worcester. October 4, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Way, Defect in highway. *Negligence. Street Railway.*

A hole five feet square and ten or twelve feet deep, dug between the tracks of a street railway for the purpose of removing earth from a sewer in process of construction, and left unguarded with nothing on the surface to indicate its existence except a small quantity of dirt not far away about nine inches or a foot high, can be found to be a defect in the highway.

Whether a person injured while trying to get on a street car moving slowly was in the exercise of due care, is a question of fact for the jury.

If the wrongful or negligent act of a third person contributed to an injury caused by a defect in a highway the city or town is not liable to the person injured, but if the defect is the proximate cause of the injury the fact that the innocent act of a third person contributed to it is no defence.

If a person, who has signalled for a street car to stop, sees the car come almost or quite to a stop, and, believing that it is stopping or has stopped in response to his signal, tries to get on it when it is moving slowly, and, failing to do so, falls into an excavation between the tracks, and sues the city for his injuries as caused by a defect in the highway, and if there is evidence tending to show that the conductor and the motorman of the car did not observe the plaintiff's signal or his attempt to get upon the car, and that the car was stopped or made to go slowly because it was passing over the excavation, the plaintiff has the right to go to the jury upon his contention that the accident was not caused by the negligence of the street railway company.

TORT for injuries alleged to have been caused by a defect in Millbury Street in Worcester, consisting of an unguarded excavation, into which the plaintiff fell while trying to board an open electric car. Writ dated November 11, 1902.

In the Superior Court the case was tried before *Pierce*, J., who at the close of the plaintiff's evidence ordered a verdict for the defendant. The plaintiff alleged exceptions.

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B. W. Potter & P. Potter, for the plaintiff.

A. P. Rugg, (*J. F. Humes* with him,) for the defendant.

KNOWLTON, C. J. The question in this case is whether there was any evidence which would warrant a verdict for the plaintiff. The defendant had dug in a street, between the tracks of an electric railway, a hole about five feet square and ten or twelve feet deep, which had been there a considerable time, and was used in taking out earth from an underground sewer then being constructed. At the time of the accident this hole was left unguarded, and according to the testimony, there was nothing on the surface of the street to indicate its existence, unless it was a small quantity of dirt not far away, about nine inches or a foot high. We think the jury would have been well warranted in finding this to be a defective condition of the street.

There was evidence for the jury on the question whether the plaintiff was in the exercise of due care. There were two railway tracks in the street, and he was standing on the side of the street opposite to the track in which the hole was, a little distance away from a point opposite to it. He gave a signal with his hand to stop the car that he might get on, and went across the street behind the car, to get upon the right hand side of it, as the left hand side was not open for the reception of passengers. He followed a short distance on the right hand side, behind the car, which came nearly or quite to a stop, and took hold of the rods on the car and tried to get on while it was moving. Failing in this he let go just as he had reached the hole, and by reason of his momentum fell in. It cannot be said as a matter of law that he was negligent in failing to see the hole before he reached it. Apparently it was concealed from his view by the car, as he approached it. He had given a signal to stop the car, and whether the conductor or motorman saw it or not, he might have supposed that the car had stopped or was stopping for him to get on. Upon the evidence, it cannot be said as a matter of law that he was negligent in trying to get on while the car was moving slowly. Whether he was negligent or not was a question of fact for the jury. *McDonough* v. *Metropolitan Railroad*, 187 Mass. 210. *Corlin* v. *West End Street Railway*, 154 Mass. 197. *Gordon* v. *West End Street Railway*, 175 Mass. 181.

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To entitle him to recover against the city under the statute it must appear that the defect was the sole cause of the accident. *Kidder* v. *Dunstable*, 7 Gray, 104. *Shepherd* v. *Chelsea*, 4 Allen, 113. *Pratt* v. *Weymouth*, 147 Mass. 245. But this does not mean that there must be no other innocent or accidental contributing cause. *Rowell* v. *Lowell*, 7 Gray, 100. It means that there must be no other culpable cause. If the wrongful or negligent act of a third person contributes to an injury, there can be no recovery under this statute, even if the plaintiff is in the exercise of due care; but if the defect is a direct and proximate cause of the accident, other concurring conditions which do not involve negligence or culpability, even if they come into a causal relation to the accident, do not relieve the city or town from liability. *Hayes* v. *Hyde Park*, 153 Mass. 514. The party responsible for the defect ought to contemplate the probability of such concurring conditions and contributing causes. The limitation of liability under the statute, as construed by the court, does not go far enough to relieve a city or town because of the existence of such conditions.

It is contended that the plaintiff does not show that the accident was not caused by the negligence of the railway company. Upon this point too we think that the evidence was for the jury. They well might find that if the plaintiff was in the exercise of due care, the negligence of the conductor or motorman contributed to the injury, and that therefore the verdict must be for the defendant. On the other hand, they might believe that the conductor and motorman did not observe his signal or his attempt to get upon the car, and that the car was stopped at that point, or made to go very slowly, because of the hole and the risk to persons working in or about it or to the track or car, if the car should run at its usual speed. There was much ground for an argument that the accident was due, at least in part, either to negligence on the part of the plaintiff, or to negligence on the part of the managers of the car. But we are of opinion that this could not properly be ruled as a matter of law, and that the case should have been submitted to the jury.

Exceptions sustained.

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CORNELIUS E. FEARNS *vs.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Worcester. October 4, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Employer's Liability. *Railroad.*

A freight brakeman running forward at night to make a coupling does not assume the risk of striking against the end of one of a pair of gates at a railroad crossing, if the accident is due to the gates being constructed improperly or out of repair so that the ends do not meet when the gates are lowered, and this is shown to be an unusual and unexpected condition.

Whether a freight brakeman, running forward at night to make a coupling and striking against the end of one of a pair of gates at a railroad crossing improperly projecting out of line, is in the exercise of due care, is a question for the jury.

TORT by a freight brakeman, against his employer, for personal injuries received on the evening of October 13, 1901, in Cambridge at the Cambridge Street crossing of the Grand Junction branch of the Boston and Albany division of the railroad operated by the defendant. Writ dated September 19, 1903.

At the trial in the Superior Court *Gaskill*, J. refused to rule that the plaintiff could not recover, and submitted the case to the jury. The jury returned a verdict for the plaintiff in the sum of $5,500, and by agreement of the parties the judge reported the case for determination by this court. If upon all the competent evidence the plaintiff was entitled to go to the jury, judgment was to be entered on the verdict; otherwise, judgment was to be entered for the defendant.

R. A. Stewart, for the defendant.

A. S. Hayes, for the plaintiff.

KNOWLTON, C. J. The plaintiff, when he entered the service of the defendant as a brakeman, impliedly assumed all the ordinary risks of the business, which included the risk of injury from permanent structures erected for proper purposes at reasonable distances from the tracks, whether then in existence or erected afterwards. In reference to the existence of such structures his employer owed him no duty other than to see that

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they did not expose him to unnecessary danger by reason of their being left in an unsafe or improper condition. If the gates had been properly constructed and in good repair, their existence near the track, at the distance shown by the testimony, would have been no evidence of negligence on the part of the defendant. *Thain* v. *Old Colony Railroad*, 161 Mass. 353. But they were improperly constructed, or out of repair, so that the ends of the two gates erected upon opposite sides of the street were not opposite to each other in the same line, as they should have been, when they were lowered, but one turned to one side and the other to the other, so as to leave an opening between them through which a man could pass. The plaintiff, while running by the side of the engine in the evening, to get a car ready for coupling, passed along by the side of one of the gates and collided with the end of the other which projected out into his line of travel, and he was thereby thrown under the engine and injured.

There was evidence that this was an improper and defective condition of the gates, and that repairs had been made previously, in an attempt to improve them. The plaintiff's implied contract when he entered the defendant's service did not cover the risk from this defective condition of the gates, if it then existed; for the condition was not so open and obvious that a brakeman, on entering the service, would be supposed to know of it, or to discover it if he undertook to ascertain the conditions under which he was to work. The evidence tends to show that it was an unusual and unexpected condition which it was the duty of the defendant to improve. In this particular the case is not like *Lovejoy* v. *Boston & Lowell Railroad*, 125 Mass. 79, *Thain* v. *Old Colony Railroad*, 161 Mass. 353, *Bell* v. *New York, New Haven, & Hartford Railroad*, 168 Mass. 443, and *Ryan* v. *New York, New Haven, & Hartford Railroad*, 169 Mass. 267. We are therefore of opinion that there was evidence of negligence on the part of the defendant, and that it could not be ruled as a matter of law that the plaintiff assumed the risk of the gates as they were at the time of the accident.

We are also of opinion that the question whether the plaintiff was in the exercise of due care was properly left to the jury. He was in the performance of his duty, and if the end of the

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gate which obstructed him had been in a line with the opposite gate he would not have been hurt. So far as appears, he did not know that the end of this gate projected out from the line of the other into the line of travel. *Thyng* v. *Fitchbury Railroad*, 156 Mass. 13. *Garant* v. *Cashman*, 183 Mass. 13.

Judgment on the verdict.

WORCESTER CITY MISSIONARY SOCIETY, trustee, *vs.* MEMORIAL CHURCH & others.

Worcester. October 4, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, & BRALEY, JJ.

Charity, Powers of managers. *Trust*, Duties of trustee. *Equity Jurisdiction*, Bill for instructions. *Equity Pleading and Practice*, Bill, Decree.

Where a will creating a charitable trust gave certain real estate to trustees and provided that they should "suffer and permit" the estate and every part of it to be under the "care, custody and management" of certain deacons, it was held that the legal title only was in the trustees, and that they could not deprive the deacons of their authority as managers of the trust estate. A similar result was reached as to certain pecuniary bequests to be held and managed by the same persons.

Where a testator gives explicit directions as to the classes of securities in which a trust fund created by his will shall be invested, it is the duty of the trustee to follow the instructions literally.

A testator, bequeathing $20,000 as a charitable trust, directed that it should be invested in certain classes of securities, and provided that the fund should on no condition be reduced below the amount devised. The net income of the fund was to be expended from year to year toward defraying the expenses of maintaining a minister and public worship. *Held*, that the trustee was not to allow the fund to be reduced below the sum of $20,000 by any intentional act of diversion, but that, if the fund should fall below that amount, the whole of the net income still should be applied to the designated purposes, and no part of it withheld, even when a loss on a certain investment reasonably might be anticipated.

A question as to the parties to be joined in a bill for instructions is not a proper subject for a prayer in such a bill.

An unnecessary declaration in a statement of findings preceding a decree in equity, although on a matter not properly the subject of the decree, may not be so irregular as to call for an amendment.

BILL IN EQUITY, filed in the Probate Court for the County of Worcester February 25, 1903, by the trustee under the will of Ichabod Washburn, late of Worcester, for instructions.

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In the Probate Court *Forbes*, J. made the following findings and decree:

"That all necessary parties have been joined as respondents to the petition.

"That under the will of Ichabod Washburn certain trusts were established for the benefit of Memorial Church and an Industrial School to be maintained in connection therewith.

"That said trusts were briefly as follows:

"1. A devise of real estate on Summer Street in Worcester to Union Society of Worcester for a place of public worship for the support of public worship and certain other religious purposes incidental thereto.

"2. A gift of $20,000, the income of which is to be applied towards defraying expenses of maintaining a Minister and public worship.

"3. A gift of $5,000 to maintain an Industrial School.

"That Union Society resigned this trust and the City Missionary Society with two representatives chosen by it, have been appointed Trustees in place of Union Society and two deacons of Union Church.

"It is therefore ordered and decreed that by the true and correct interpretation of the clauses as to which the petition is brought:

"1. The legal title to the Summer Street real estate was vested in Union Society and is now vested in the petitioner as its successor, and that the four deacons had and their successors have exclusive control of said real estate subject to the religious uses set forth in the will and they are to care for the property and to receive and pay out the income accruing from it.

"2. In regard to the gift of $5,000, for the maintenance of an Industrial School, the naked legal title to the principal was in the Union Society and now is in the petitioner as its successor, while the management and control of the fund and its expenditure are in the hands of the successors to the four deacons as trustees.

"3. The fund of $20,000 shall be held by the petitioner and managed by the said successors to the four deacons, and that the gift 'to said Trustees' means that the title to this fund vests in the petitioner as trustee and is to be managed by the successors

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to said four deacons in the same manner as the real estate and fund of $5,000.

"4. The directions in the will as to the investment of the fund of $20,000 should be literally followed by the trustees.

"5. The net income of the fund of $20,000 should be expended from year to year 'towards defraying the expenses of maintaining a Minister and Public Worship' even if the trustees reasonably anticipate a loss to the principal on account of a mortgage loan, the exact value of which cannot now be determined.

"6. The Trustees are not to allow the fund to be reduced below the sum of $20,000 by any intentional act of diversion, but if in fact the fund falls below that amount the net income of the fund is to be expended as above set forth and is not to be held back to make good any anticipated loss of principal."

The plaintiff appealed; and the case came on to be heard before *Hammond*, J., who reserved it upon the bill, answer and other records in the case for determination by the full court.

The material part of the will of Ichabod Washburn was as follows:

"Whereas I have long felt that it was desir*reable* to devise some means by which a pretty numerous class of persons in the City of Worcester who are now living without the benefits of moral and religious instruction and restraint which grows out of an habitual attendance upon the ministrations of the gospel, should be supp*lyed* with opp*ertunities* and inducements to enjoy the same.

"And whereas it has seemed to me that the readiest way of accomplishing this purpose would be to open for the use of all who may be disposed to avail themselves of the same, a suitable and respectable place of worship wherein upon the Lord's Day and at suitable times on week days religious services may be held and conducted by some learned, pious and devoted Christian Minister, who, in addition to preaching and conducting public worship shall devote hims*ilfe* by visits and personal influence to *pursuading* indu*ccing* such as may be un*acustomed* to attend worship or who neglect the Sabbath or from any cause are destitute of the health*full* restraints and moral influence of religious instructions, to attend upon the services in such place of worship.

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"And whereas I have caused such a house to be erected in which the Rev. Henry T. Cheever is now officiating as City Missionary, I have a strong hope of aid hereafter to carry out the design I had in causing said house to be erected.

"Now in order to give consist*ancey* and effect to a plan for accomplishing the purposes and views above named, I give and devise unto the Union Society, a Parish or religious society in Worcester (of which I am now a member) that real estate situate in Worcester at the intersection of Bridge with Summer Street, containing fifty-five hundred square feet of land, viz.: fifty-five feet in front upon Summer Street, and one hundred feet on Bridge Street with the building erected thereon, with all the privil*ages* and app*ertenences* thereto belonging, to have and hold the same to the said Parish or religious society, their successors and assigns forever. In trust, nevertheless, and to and for the purposes and trusts hereinafter declared and no other.

"And in order the more clearly to indicate the character and objects of these trusts, I wish to pre*mise* that the plan I have proposed to ca*ry* out is this:

"First. To have a suitable and respectable place of public worship with convenient accom*odation* for Bible and Sunday School classes, and one or more tenements for the accom*odation* of the Minister and Sexton.

"The Minister to be employed to preach in said house or to be let at a reasonable rent towards keeping the premises insured and in repair and supporting the Minister aforesaid.

"Second. To have a Minister whose religious views shall substantially harmonize with what are denominated to be Evangelical in their character who shall be endowed with respectable powers of intellect and be as faith*full*, pious and devoted lab*ourer* in the work of t*each* and preaching the word of God.

"Third. It is my wish and intention by this bequest to form an important auxiliary in the missionary enterprise of preaching and min*intering* to the destitute in the city, and to those who do not feel sufficient interest in sacred things to attend upon the preaching of other ministers.

"The Trusts, therefore, upon which said estate is to be held by said dev*ises* and trustees are as follows:

"In the first place, That they shall suffer and permit said

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estate and every part thereof to be under the care and custod*gy* and management of two of the deacons of the Union Church as shall be designated by said church, and two deacons of the Mission Chapel Church recently organized, and their respective successors for the time being or of a major part of them, and shall allow said four deacons to obtain insurance upon said buildings in the name of said trustees and the said deacons, and to cause the same to be kept constantly insured to a reasonable amount, and in case of loss or damage by fire shall allow said deacons to recover said insurance money, and to apply the same according to their best discretion in repairing or rebuilding said building, as the case may be, in the name of said trustees, but without charge to them and permit said deacons from such insurance or other monies forever to keep and maintain upon said premises a house of public worship and tenements connected therewith as large and convenient as the same now standing thereon are.

"In the next place, That said trustees shall forever suffer and permit that portion of said premises designed for the purposes of public worship to be occupied at all reasonable and proper times for public worship under the charge and ministration of a Minister of the Gospel who has been regularly ordained or set apart according to the usages of the denomination of Christians with which he may be connected and whose religious sentiments and opinions shall substantially conform to those now gen*nerally* known and understood as Evangelical.

"And further that said trustees shall suffer and permit the parts of said building designed for the use and accommodation of the *sabbath* and Bible classes to be occupied for that purpose at all suitable times under the direction of such minister and deacons or a major part of them.

"And suffer and permit the house to be occupied free from rent or charge by any decent and orderly person who may resort thither for the purpose of attending worship at all times under such reasonable regulations as may be adopted by said deacons and said minister or a major part of them for preserving order and propriety of deportment in said house.

"And suffer and permit the minister selected as aforesaid to occupy and improve so much of the tenement in said building designed for the use of the families as in the judgment of the

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deacons shall be reasonably sufficient for his convenience so long as he shall be employed by them as such minister and upon such terms as they shall judge expedient having proper reference to the use of such tenement as a means of support and encouragement of such minister.

"And shall permit said deacons in the name of said trustees to let such other portions of the said estate as they may judge best upon reasonable rents and collect and apply the same in keeping the premises in repair in paying the contingent expenses in conducting and manag*eing* the same and in causing the same to be insured and appropriate and apply the surplus if any towards the support of the minister.

"And further shall suffer and permit said deacons in the name of said trustees to commence and carry on to final judgment all necessary and proper suits or actions at law or in equity to enable them to manage and control said estate as hereinbefore expressed, to collect the rents thereof or remove the tenants thereof when the same shall be necessary and generally to do whatever acts or things may be necessary or proper to effect and carry out the true interest and meaning of the trusts aforesaid and accomplish the same.

"And whenever the said deacons or a major part of them shall *shall* with the approbation of the Mission Chapel Church judge it expedient to terminate the engagement of any minister who may have been employed to officiate in said house of public worship it shall be compet*ant* for them so to do and they may thereupon proceed to select another in his stead in *in* manner aforesaid and if approved as aforesaid to employ him accordingly.

"And I further give bequeath and devise unto said trustees the sum A twenty thousand dollars to be by said trustees invested in the bonds or securities of the United States or of the Commonwealth or of towns within the Commonwealth if such bonds or securities can be obtained for investment, otherwise upon personal notes or bonds secured by a first mortgage of real estate or full and ample value not exceeding one half*e* of its appraised value to render the loan thereon safe and undoubted in no case is any part of the money to be so loaned on personal notes or bonds if the first named class of securities can be obtained. The fund on no condition to be reduced below the amount devised.

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"In the event of the necessity of loaning a part or the whole of said fund on real estate, the appraisal of the same shall be made by three disint*ered* and compet*ant* judges of such estate of which value not more than one half shall consist of buildings thereon, the interest thereon and income thereof, shall be semi-annually collected and applied by said trustee towards defraying the expenses of main*tain* a minister and public worship as hereinabove expressed or if it shall become necessary may apply the principal toward rebuilding said house if destroyed, nor are said trustees to be held respons*able* for the loss of any part of said princi*ple* or interest provided the same shall be invested and applied by said trustees, nor are they to be subjected to any charge or cost on account of the same nor on account of any suit or action which may be necessary to bring to collect or recover said fund or the interest thereof.

"It is my further direction and devise that there should be kept and maintained in connection with the Mission Chapel aforesaid an Industrial School for children of poor parents in the City of Worcester who in the judgment of said trustees may be fit objects to share in the benefits thereof, said school to be taught on some day or days in the week and devoted to instruction in knit*ing*, sewing mak*eing* garments and such other domestic arts as in the judgment of those in charge of the school can be usefully and properly taught in such a school as well as to the inculcation of moral duties, the cultivation of good manners and the social intellectual and moral elevation of its pupil.

"And to enable said trustees to provide a portion of the means for carrying on said school and furnishing if need be to deserving destitute children who may regularly attend said school some parts of their necessary clothing.

"I direct that the sum of five thousand dollars in addition to what I have above given for the purpose of said Chapel be paid to be held and managed by the same persons, as are to hold and manage the trusts in respect to said chapel."

J. S. Gould, for the plaintiff.

C. M. Thayer, (*C. A. Hamilton* with him,) for the defendants.

KNOWLTON, C. J. The first question of importance between the plaintiff and the defendants is whether the will gives the plaintiff, as trustee, a right to control the disposition and man-

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agement of the property of which it holds the title, or whether the deacons referred to in the will can act independently of the holder of the title in all matters involved in the care, custody and management of the property. Looking first to the real estate devised, we think it pretty plain that the deacons are to act independently in a relation of trust, in all the matters of which, under the will, they are to have the management. Although the first statement of the trust under which the plaintiff holds the property, requires the plaintiff to "suffer and permit" the estate "to be under the care custody and management" of the deacons designated, the language is imperative, and gives these deacons authority in the management of the trust estate, of which the corporation cannot deprive them. Their relation to the scheme of the testator is similar to that of the managers of the library in *Cary Library* v. *Bliss*, 151 Mass. 364, and the selectmen and ministers under the will of Dr. Franklin, as appears in the suit of *Boston* v. *Doyle*, 184 Mass. 373. As managers they stand in a relation of trust to the property whose legal title is held by another as trustee.

The legacy of $5,000 given for the support of an industrial school, is by the express terms of the will, "to be held and managed by the same persons, as are to hold and manage the trusts in respect to said chapel." The powers and duties of the deacons in regard to this legacy are similar to their powers and duties in regard to the chapel.

There is more room for doubt about the legacy of $20,000 given to defray "the expenses of maintaining a minister and public worship," and if necessary to be applied "toward rebuilding said house if destroyed." In making this gift the testator does not in terms refer to the deacons as managers; but this is one of the trusts in respect to the chapel, mentioned in a later clause, and in reference to the methods of management it is there put in the same clause with the devise of the real estate, and is spoken of as held and managed by the same persons. The close connection of this legacy with the devise of the real estate brings us to the conclusion that the testator intended the three gifts to be held and managed by the same persons. We are therefore of opinion that the first three propositions embodied in the order and decree of the Probate Court establishing the respective rights of the plaintiff and of the deacons in the three gifts are correct.

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It is also plain that the directions in the will as to the investment of the fund of $20,000 should be literally followed by the trustees, as declared in the decree.

The fifth and sixth of the instructions stated in the decree, are also correct. The requirements there stated are just and equitable, and in accordance with the decisions of this court. *Parsons* v. *Winslow*, 16 Mass. 361. *New England Trust Co.* v. *Eaton*, 140 Mass. 532, 534. *Stone* v. *Littlefield*, 151 Mass. 485.

The plaintiff objects to the finding stated in the decree as a preliminary to the substantive parts of the decree, that "the trusts were established for the benefit of Memorial Church and an industrial school to be maintained therewith," and contends that they were established for the benefit of people in Worcester who would enjoy their privileges. Undoubtedly they were established for the benefit of the people; but as the church and the school are public charitable institutions which are acting as agencies in dispensing the charity, it is not incorrect to say that the trusts are for the benefit of these institutions.

The plaintiff, in its bill, asked the court to give instructions as to whether the proper parties were joined in the suit. This is not a proper subject for instructions, but is proper for determination as a part of the procedure in the case. The finding, "That all necessary parties have been joined as respondents to the petition," stated as a preliminary in the decree, is unnecessary; but as it appears before that which is ordered and decreed, it is not so irregular as to call for a change of the decree.

The objection to the fifth instruction is now waived as it is agreed that a loss has occurred.

We perceive no such inconsistency between the present decree and the former decrees of the Probate Court in reference to this trust as should preclude the court from giving these instructions.

Decree affirmed.

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Asa A. Westcott *vs.* City of Boston.

Worcester. October 4, 1904. — October 18, 1904.

Present: Knowlton, C. J., Barker, Hammond, Loring, & Braley, JJ.

Municipal Corporations. Statute, Construction. *Negligence. Boston.*

The rule, that a city or town is not liable in tort for damage caused by its diverting water from a highway upon neighboring land in the performance of its duty to keep the highway convenient for travel, does not apply to damage caused by negligence in the construction of a conduit built to drain a large body of land principally owned by private persons, under a statute giving a city power to lay and construct works for the drainage of lands outside of streets.

A statute giving damages for injuries to land from the construction of sewerage works authorized by the statute, in the absence of an express provision that the remedy is to be exclusive, will not be construed to take away the right of a landowner to maintain an action of tort for injuries to his land from tortious or negligent acts done in exercising the powers conferred by the statute. So of the remedy given by § 5 of St. 1897, c. 426, relating to sewerage works of the city of Boston.

Whether a city constructing a conduit under statutory authority is negligent, in building the upper end of the conduit first and leaving it open and unconnected for a year and several months, during which time in very unusual conditions of weather the water flowing from it damages certain land below, is a question of fact and not of law. In such a case it is for a jury to say, whether the weather conditions which caused the damage reasonably were to be expected and reasonably could have been guarded against and whether under all the circumstances leaving the upper section of the conduit open for so long a period was negligence.

Tort for damage to the plaintiff's property, in that part of Boston called Dorchester, by the alleged negligence of the defendant in the construction and management of a surface water sewer or conduit. Writ dated January 3, 1903.

In the Superior Court the case was tried before *Gaskill*, J. upon the question of liability only. The judge ordered a verdict for the plaintiff, and reported the case for determination by this court, upon the terms stated in the fifth paragraph of the opinion.

P. Nichols, for the defendant.

G. J. Tufts, (*T. G. Kent* with him,) for the plaintiff.

Barker, J. In January, 1898, the street commissioners of Boston under the provisions of St. 1897, c. 426, authorized the relocation of the Oakland Garden branch of the Stony Brook

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sewer as a surface water conduit and ordered its construction, which was begun early in the year 1898. The conduit was intended not merely to care for the surface water of streets, but to collect and carry off all the surface water including that of streams, brooks and natural watercourses on a large body of land. This body of land lies between Franklin Park and a tract of about five acres belonging to the plaintiff, about a mile distant from the park, and lower than the park, the intervening land having a slope down to the plaintiff's land. His land was divided by streets which he had built and on it were buildings which he had erected and which he occupied or rented to others.

The conduit was not completed until about June 27, 1900. The upper part of it toward the park was built first, and the lower end of that part, near the plaintiff's land, was left open and unconnected with any artificial means of carrying off the water which issued from it for more than a year before 1900, and for some months during the year 1900. The conduit was finished by building the lower portion of it in separate sections until all was completed, and not until then was the lower portion united with the section first constructed.

In June and September, 1899, and to a much greater extent in February and March, 1900, the waters collected by the upper section of the conduit, and so brought down to its open mouth, ran upon and caused damage to the plaintiff's land by washing away the soil, tearing out the curbstones of his streets, filling cellars, injuring foundation walls, and in other like ways.

This upper section of the conduit was built in the bed of a natural watercourse. No more water in the aggregate came down this upper section or left it at the lower end than came down the watercourse immediately before the conduit was built, and no greater area was drained by it than was drained by the old watercourse; but the water was so confined by the conduit that it came out from its open end in greater volume than ever before and with increased force, thereby causing the damage to the plaintiff's land.

The writ is in tort and was sued out on January 8, 1903. There was a jury trial at which by agreement of counsel and direction of the presiding judge the liability of the defendant was tried upon certain facts relied upon by one party or the

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other, and which are stated in the report by which the case comes here. A verdict for the plaintiff was ordered by the judge. By the terms of the report if the verdict was ordered rightly it is to stand and the plaintiff's damages are to be assessed by a jury. If the ordering of the verdict by the judge was error, but the facts relied on by the plaintiff would justify a jury in finding in his favor, a new trial is to be granted. If none of the facts would justify a verdict in his favor judgment is to be entered for the defendant.

The statute cited provides that the street commissioners may widen, deepen, pave or cover watercourses, or construct open sewers or conduits for the drainage of lands, and may take lands for those purposes, and that the superintendent of streets shall carry out the orders of the commissioners and do any act or thing deemed by him necessary in constructing or maintaining the work. It also gives a remedy by petition for all damages sustained by the owner of any land, watercourse, right, or easement taken by the commissioners, or injured in any manner or by any person in doing any act or thing under the section of the statute which requires the superintendent of streets to carry out the orders of the commissioners and authorizes him to do anything deemed by him necessary in constructing or maintaining the works. See St. 1897, c. 426, §§ 2–5.

1. The defendant contends that it is not liable in this action because the conduit was built for the purpose of carrying away surface water from streets, and a town or city is not liable in tort if in performance of its duty to keep a highway safe and convenient for travel it diverts water upon neighboring land, citing *Flagg* v. *Worcester*, 13 Gray, 601, *Holleran* v. *Boston*, 176 Mass. 75, and numerous other like cases. But the provisions of St. 1897, c. 426, do much more than to enable the defendant to deal with surface water upon streets. The statute gives power to lay and construct works for the drainage of lands outside of streets, and such in great part was the work now in question. The doctrine invoked is not here applicable, the conduit having been laid and built to drain a large body of land mostly in private ownership.

2. The defendant also contends that even if the plaintiff's damages were not the necessary result of the work ordered by

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the commissioners but were occasioned by tortious negligence in carrying out such orders, this action will not lie. In support of this contention the defendant calls attention to the peculiar wording of § 5 of the statute, giving a remedy by petition not merely for damages for any land, watercourse, right or easement taken by the commissioners, but also when any land, watercourse, right, or easement is "injured in any manner, or by any person, in doing any act or thing" under § 4 of the statute.

The defendant's argument is that the temporary nature of the plaintiff's damages would be no defence to a petition under § 5; *Penney* v. *Commonwealth*, 173 Mass. 507; that the damages are caused by some act or thing done by some person or persons under the provisions of § 4, and so are within the language of § 5; and that it is to be supposed that the Legislature, having in mind the inconvenience and injustice resulting from a doubtful or double remedy, has in this enactment provided for a single proceeding to cover injuries of every conceivable description.

We do not so construe the statute. The right of every landowner to recover by the usual processes of law for tortious damages to his land is important, and one which we cannot hold the Legislature to have taken away in any instance unless its language has no other reasonable meaning. In the absence of an explicit provision that the remedy by petition is to be exclusive, and is to extend to damages due to tortious and negligent acts done in carrying out the purposes of the statute, we hold that notwithstanding the very general language of § 5 the remedy for such acts is by action of tort and not by petition.

3. We think, however, that upon the facts which were before the court, whether the defendant was negligent in the construction of the conduit was a question of fact, rather than a question of law. It is true that the time was very long which elapsed between the building of the upper section and the providing of some suitable means for carrying away the water expected to be collected by it and discharged from its lower aperture. But there seems to have been no possibility of causing damage by so leaving that section of the conduit in ordinary stages of the flow, nor except in very unusual conditions of weather. Whether such conditions as those which caused the damage to the plaintiff in June and September of 1899 and in February and March of

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1900 were reasonably to be expected and reasonably could have been provided against were not questions of law. We think the case should have been left to the jury to say whether under all the circumstances bearing on the matter the leaving of the upper section of the conduit as it was left for the period during which it was so left was negligence. For this reason the verdict for the plaintiff must be set aside and a new trial be granted.

So ordered.

ABRAHAM COHEN *vs.* HAMBLIN AND RUSSELL MANUFACTURING COMPANY.

Worcester. October 4, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Employer's liability. *Evidence*, Collateral issues: remoteness.

A boy fourteen years of age who has had the ends of two fingers cut off by a power press for cutting out wire gauze, which he had been operating for two days before the day of the accident, if he testifies, that he fully understood the operation of the machine, and that the superintendent warned him to look out for his fingers, and if, when the continued operation of the machine caused the muscles of his right leg to become numb and his eyes to become strained, he continued to work without mentioning these facts, cannot recover from his employer for the injury of which he assumed the risk.

In an action, by a boy fourteen years of age when injured, for the cutting off of the ends of two of his fingers by a power press for cutting out wire gauze, which he was operating, the plaintiff cannot be permitted to show, that in previous attempts to operate the machine by children of the age of the plaintiff the other children had been caught in the same manner as the plaintiff.

TORT, by a boy fourteen years of age when injured, for the cutting off of the ends of two of his fingers by a power press for cutting wire gauze, which the plaintiff was operating under the direction of a superintendent of the defendant. Writ dated June 22, 1903.

In the Superior Court *Gaskill*, J. ordered a verdict for the defendant; and the plaintiff alleged exceptions.

R. Hoar, for the plaintiff.

C. C. Milton & D. F. Gay, for the defendant.

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BARKER, J. The plaintiff was the only witness whose testimony was taken at the trial. He gave in evidence a full and accurate description of the machine in operating which he was hurt, and further testified that before the time of the accident he fully understood the operation of the machine. It was a stamping press and the risk of having the fingers of the operator caught was obvious. Besides this he testified that the superintendent warned him to look out for his fingers. The plaintiff was fourteen years of age and had been at work on the machine for two days before the day of the accident. There was no contention that the machine was in any way defective or out of repair. These undisputed circumstances seem to make a case in which the defendant was not at fault, and in which the plaintiff accepted an obvious risk of his employment. But the plaintiff after testifying that the continued operation of the machine in the manner in which the superintendent directed him to work it caused the muscles of his right leg to become numbed and his eyes to become strained, offered to show by other witnesses that in previous attempts to operate the machine by children of the age of the plaintiff the children had been caught while operating the machine in the same manner as the plaintiff, and there was an exception to the exclusion of this evidence.

Evidence of other like occurrences however similar was incompetent because raising collateral issues. *Kennedy* v. *Spring*, 160 Mass. 203. *Connors* v. *Morton*, 160 Mass. 333. When the Legislature has not made it unlawful to employ a certain operator upon a certain machine, the obligations of the employer and the rights of the employee must be determined by the application of the ordinary rules of law. The plaintiff gave no notice to any one that his leg was becoming numb, or that his eyes were strained, or that he in any way felt incompetent to prosecute his work with safety.

Exceptions overruled.

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AMERICAN ELECTRICAL WORKS *vs.* NEW ENGLAND ELECTRIC RAILROAD CONSTRUCTION COMPANY.

Worcester. October 4, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Contract, What constitutes, Performance and breach. *Evidence*, Competency and materiality, Extrinsic affecting writings. *Practice, Civil*, New trial.

Where in an action of contract the evidence warrants a finding that the plaintiff and the defendant made an oral agreement upon the terms of a contract in writing between the defendant and a third person, the plaintiff may sue on the oral contract without showing an assignment to him of the contract in writing. Following *Plunger Elevator Co.* v. *Day*, 184 Mass. 130.

In an action of contract for a balance alleged to be due for wire sold by the pound, under an agreement by which the plaintiff was to furnish the wire called for by the defendant under the terms of the contract, the defendant is not entitled to a ruling that there is no evidence that the contract was fully performed by the plaintiff, if there is evidence that the plaintiff delivered all the wire called for by the defendant under the contract.

In an action of contract, upon an oral agreement adopting the terms of a contract in writing between the defendant and a third person, the defendant cannot put in evidence oral statements of a salesman of the third person before the contract in writing between the third person and the defendant was made, for, even if such oral statements made before the contract was reduced to writing could be admitted as against the third person, they are both incompetent and immaterial against the plaintiff who is not suing on an assignment of the contract.

It is a proper exercise of discretion for a presiding judge to deny a defendant's motion for a new trial made on the ground that the plaintiff's counsel in his closing argument commented on certain matters not in evidence, if the presiding judge on the defendant's objection directed the plaintiff's counsel to confine his argument to the evidence and the counsel thereafter did so, especially where the defendant allowed the case to go to the jury without attempting to have the trial ended on account of the impropriety.

CONTRACT for a balance of purchase money alleged to be due for wire sold by the pound. Writ dated April 2, 1901.

At the trial in the Superior Court before *DeCourcy*, J., the defendant admitted the receipt of the wire specified in the declaration and put in evidence a contract in writing between it and a corporation called the Bibber-White Company, for the delivery of certain wire at the defendant's option, the amount to be delivered being stated in miles and feet and the price to be paid being by the pound.

The jury returned a verdict for the plaintiff in the sum of

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$703.29; and the defendant alleged exceptions to a refusal to direct a verdict for the defendant, to the exclusion of certain evidence, and to the denial of a motion for a new trial.

W. C. Mellish, for the defendant.

R. M. Washburn & G. Calkins, for the plaintiff.

LORING, J. [After a statement of the case incorporated above.] 1. The first ground on which the defendant now contends that the evidence did not warrant a verdict for the plaintiff is that there was no evidence that the Bibber-White Company ever had assigned the written contract to the plaintiff. But this is not necessary. The evidence and especially the correspondence warranted a finding that the plaintiff and the defendant had entered into an oral agreement on the terms of the written contract between the Bibber-White Company and the defendant, as in *Plunger Elevator Co.* v. *Day*, 184 Mass. 130.

2. The next contention made by the defendant, in support of his exception to the refusal to direct a verdict for him, is that there was no evidence that the contract so made was fully performed by the plaintiff. It was in evidence that the defendant had exercised the option given it under the contract by delivering its notes to the amount of $12,000 in part payment for the wire sold, all of which notes had been finally paid, and had paid $3,000 in cash. This evidence warranted a finding that the plaintiff had delivered all the wire the defendant had called for under the contract.

3. The president of the defendant company testified without objection on the part of the plaintiff that before signing the contract with the Bibber-White Company he asked one Smith, who was a salesman for that company, "the price at which Bibber-White Company sold wire; Smith stated that a mile of 500,000 c. m.* wire should weigh so many pounds per thousand feet; witness had contract drawn up in writing which was signed by both parties." Later on Smith was put on the stand by the defendant and asked what was said at this interview in relation to the number of pounds of wire which constituted a mile of five hundred thousand c. m. wire which made up most of the wire delivered. The evidence was rightly excluded. The evi-

* Circular mils.

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dence offered was not that a mile of five hundred thousand c. m. wire had a trade meaning of a mile in length and approximately ninety-eight hundred pounds in weight. What the defendant offered to put in evidence was nothing more than testimony of previous oral statements not made part of the trade agreed on when the bargain was struck and reduced to writing. We do not stop to point out that even if the action had been between the parties to the contract it would not have been admissible because the plaintiff's case here was not that the Bibber-White contract had been assigned to it, but that it had made an oral agreement with the defendant on the terms stated in the written contract between it and the Bibber-White Company on the principle enforced in *Plunger Elevator Co.* v. *Day*, 184 Mass. 130. In such a case the previous oral statements of the salesman of the Bibber-White Company are not only incompetent but are immaterial.

4. The only ground on which it now is contended that the defendant's motion for a new trial should have been granted as matter of law is the reference made in the closing argument of the plaintiff's counsel to the difficulty of getting answers to its interrogatories to the president of the defendant corporation, and to the unsatisfactory character of the answers finally obtained. The interrogatories had not been put in evidence and no allusion had been made to them during the trial up to that time. The defendant objected, and the plaintiff's counsel was directed by the presiding judge to confine his argument to the evidence, and that direction was immediately complied with.

The defendant was not entitled to have the trial ended because of this impropriety on the part of the plaintiff's counsel. Moreover if he could have asked to have the trial ended because of this he did not do so, but on the judge's directing the counsel to confine his argument within proper limits took his chances of getting a verdict without asking to have instructions given to the jury on the matter. Under these circumstances the general rule that a motion for a new trial rests in the discretion of the judge (as to which see *Fox* v. *Chelsea*, 171 Mass. 297) applies here. *O'Connell* v. *Dow*, 182 Mass. 541. *Commonwealth* v. *White*, 148 Mass. 429.

The other exceptions have not been argued and we treat them as waived. *Exceptions overruled.*

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JOHN P. FISHER *vs.* JOHN A. ALSTEN & another.

Worcester. October 5, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, & BRALEY, JJ.

Replevin. Voting Contest.

A candidate in a voting contest for a chattel at a fair, if the committee having authority in the matter declare another person to be the winner and make a symbolical delivery of the chattel to such other person, cannot maintain replevin for the chattel on the ground that the decision of the committee was wrong and that he should have been declared the winner, having no title and no right to possession.

For the purposes of the decision of this case, it was assumed, that a voting contest at a fair for a chattel at ten cents a vote is legal, and also it was assumed, that in such a contest the person who turned in the most cash, exclusive of promissory notes, should have been declared the winner.

REPLEVIN for a motor cycle which had been the subject of a voting contest at a public fair of an association known as the Viking Cycle Club in Worcester. Writ in the Central District Court of Worcester dated March 30, 1903.

On appeal to the Superior Court the case was tried before *Gaskill*, J. It appeared that the club chose a committee of five who were given full power to carry on a fair with voting contests; that the committee hired Mechanics Hall and conducted a fair in the name of the club for several days and evenings, closing on a Saturday; that a voting contest for "the most popular bicycle rider in Worcester" was open to all, and that several persons, including the plaintiff, one Eld and one Nilson, were solicited by members of the committee to enter the contest, which was for the motor cycle replevied.

The plaintiff testified that one Pope, a member of the committee, asked him to enter the contest, and gave him a book with which to solicit votes, saying that they would be ten cents apiece, and that the man who turned in the most money by eleven o'clock the last night of the fair would be the winner of the wheel. Pope, called as a witness by the plaintiff, testified that nothing was said about money excepting that the votes were to be ten cents each. Eld testified that one Pierson, a member of the

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committee, urged him to enter the contest, and told him that the wheel would be voted away at ten cents a vote.

Each contestant was given a book in which persons desiring to vote wrote their names together with the amount contributed. The contestants themselves and their friends circulated these books and solicited votes. The money paid for votes remained the property of the club, whether the votes were given for a successful or an unsuccessful contestant. The motor cycle was on exhibition in the hall during the fair. At about a quarter past ten on the evening of Saturday, Nilson, who was a man of good financial standing and an owner of real estate, went to the treasurer of the committee and showed a promissory note for $50, signed by himself and payable to the Viking Cycle Club on demand, proposing to turn it in for five hundred votes for himself in the motor cycle contest. The note was shown to a majority of the committee, who assented to accepting it in payment for votes. No public announcement was made as to whether notes would be accepted. It did not appear that any note was offered by the plaintiff or his friends, or that any note was refused. Before the time for voting expired, the Nilson note was placed with the cash which represented the proceeds of the voting for Nilson, and the votes purchased thereby were sufficient to give him the highest number, although the plaintiff at eleven o'clock on Saturday evening had the most cash turned in and would have had the highest number of votes if the note had not been counted. Subsequently the full committee voted to accept and count the note, and declared Nilson to be the winner.

Between eleven and twelve o'clock on Saturday evening the committee caused it to be publicly announced from the platform of the hall that Nilson had won the motor cycle. The treasurer then, in behalf of the committee, informed Nilson that the motor cycle was his, and delivered to him the "spark valve," which, as it appeared, was a small but important part of the mechanism, without which the machine would not run. The rest of the motor cycle was carried from the hall to the store of the defendants to be put in running order. The committee had bought the cycle from the defendants in the name of the club, but it then had not been paid for. Both Nilson and the plaintiff were members of the club. Eld was not.

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On the Monday morning next following, the plaintiff visited the defendants' store and demanded the motor cycle. The defendants replied that they understood Nilson to be the winner, and refused to give it up. The cycle then was replevied by a constable who had accompanied the plaintiff and previously had made a demand.

Afterwards on the same day Nilson paid his note for $50, and on the next day the committee paid the defendants the bill incurred by the club in connection with the fair, including the price of the motor cycle.

At the close of the plaintiff's evidence, the defendants asked the judge to rule that the plaintiff was not entitled to recover. The judge asked the defendants' counsel whether he rested, and the counsel replied that he did. Whereupon the judge declined to rule as requested, and upon the foregoing undisputed facts directed a verdict for the plaintiff. The defendants alleged exceptions.

C. T. Tatman & H. W. Bowker, for the defendants.

J. H. S. Hunt, E. H. O'Brien & J. A. Thayer, for the plaintiff.

HAMMOND, J. Even if it be assumed in favor of the plaintiff that the "voting contest" was legal, and further, that he, as the person who turned in the most cash, should have been declared the winner, there is still one defect in his case which is fatal.

The action is replevin and the plaintiff must show at least his right to possession. And this must be a legal right; an equitable right is not sufficient. In this case the right must rest on title alone; and the title never was in the plaintiff. The committee, acting under "full power to manage and carry on the fair and the voting contests," decided and formally announced that Nilson was the winner, and delivered to him an essential part of the machine as a symbolical delivery of the whole. It is not shown that the committee did not act in good faith and in accordance with an honest belief as to the proper interpretation of the conditions of the contest and the rights of the contestants. It does not appear that at the time Nilson was declared the winner the plaintiff was present or knew the state of the "polls," but at any rate he does not seem to have made any objection to the action of the committee until the following Monday.

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It is plain that up to the time of the decision of the committee in favor of Nilson the proceedings had not gone beyond a mere executory contract so far as respected the committee. Right or wrong they did not think that the plaintiff had won, and the minds of the contracting parties never met in favor of the plaintiff on that question. Hence neither the title nor the right to possession arising therefrom ever passed to the plaintiff. If he has been aggrieved by the action of the committee he must seek his remedy in another form of action.

Exceptions sustained.

LAKESIDE MANUFACTURING COMPANY *vs.* CITY OF WORCESTER.

Worcester. October 5, 6, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, & BRALEY, JJ.

Damages. Watercourse. Practice, Civil, Exceptions. *Evidence,* Collateral issues: remoteness, Opinion: experts, Of value of real estate.

On a petition against the city of Worcester for damages caused by its taking of the waters of Kettle Brook under St. 1895, c. 384, the petitioner and the respondent agreed that all damages, except for the value of the use of the waters of the brook for purposes of power, should be submitted to a referee. This was done and an award was made and accepted. On a claim for the damages excepted, heard by commissioners and afterwards tried in the Superior Court, it was *held*, that the diminution in value in the parts of the property which had been procured or constructed in order to make the right to use the water available was included in the former award for property taken, and was not a part of the excepted claim for damages for value of the brook for purposes of power; *also*, that the right of the petitioner to use its dam, and its flowage rights in the lands of others conveyed to it by deeds, likewise were parts of the property taken and therefore were included in the former award; *also*, that evidence of the cost of reproducing the dam, and evidence of the special value of the water for washing and scouring, rightly were excluded as immaterial in assessing the value of the water for purposes of power, the only question open.

One lawfully using the waters of a stream in maintaining a mill cannot acquire a prescriptive right to have other riparian proprietors farther up the stream continue to maintain reservoirs which they have maintained in the exercise of their right as such proprietors and which incidentally have operated to his advantage in increasing the power at his mill.

In assessing the damages of a mill owner, for loss of water power by the taking of the waters of a stream as a water supply, it is right to refuse to instruct a jury, that, if the substitution of steam power for water power would be a reasonable

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and proper mode of using the property after the taking of the water, the measure of the petitioner's damages due solely to the taking of the water power "is the cost of producing annually a full equivalent therefor by the substitution of steam power for the water power taken"; because, although this would be a proper subject for consideration by the jury, it cannot be said as matter of law that the measure of damage is the cost that might result from a certain reasonable mode of repairing the damage, to the exclusion of other reasonable and proper modes; also because such an instruction would assume that present conditions would remain unchanged; and also because the cost of procuring another kind of power at great expense would include an expenditure made necessary on account of damage which otherwise would come to the other property of the mill owner, and therefore would exceed the amount of damage due solely to the taking of the water power.

It is no ground for exception, that a presiding judge refuses to instruct the jury upon a part of the evidence and to say that there is a possible view of the evidence which would warrant them in coming to a certain conclusion.

On a petition by a mill owner for damages from the taking of a stream as a water supply, upon the issue of the value of the water power to the petitioner, evidence as to the value of the use of water in connection with a reservoir below the petitioner's mill receiving part of its water from a watershed which did not supply the petitioner's pond, properly is excluded as too remote.

On the issue of the value to a mill owner of the water power of a stream taken as a water supply, a question, as to the average daily yield in horse power from the watershed feeding the stream, including times of the highest water and of the lowest, may not be competent to show the usual available power of the stream, where it appears that at certain seasons of the year a large amount of surplus water ran to waste.

At the trial of a petition by a mill owner for damages from the taking of a stream as a water supply, on the issue of the value of the waters for purposes of power, the presiding judge in the exercise of his discretion properly may refuse to allow a mechanical engineer having a large experience with steam power, who has no knowledge of values in the neighborhood, except that of a mechanical engineer, to state, from his knowledge of the cost of producing horse power in that locality and in other localities, what was the value per horse power of the power of the stream at the petitioner's mill, the judge allowing the witness to give the cost of producing the power.

At the trial of a petition by a mill owner for damages from the taking of a stream as a water supply, on the issue of the value of the waters for purposes of power, the presiding judge in the exercise of his discretion properly may refuse to allow an expert in hydraulic engineering familiar with the cost and value of water power and steam power, but having no knowledge of the value of real estate in the town where the petitioner's mill is situated, or elsewhere, and knowing of no sales of power apart from land, to give his opinion as to the value of the waters of the stream in question and as to the damage to the petitioner's property caused by the taking of the waters.

At the trial of a petition by a mill owner for damages from the taking of a stream as a water supply, on the issue of the value of the waters for purposes of power, where a mechanical engineer of large experience in connection with steam engines and the production of power by steam, who made tests of the engines at the petitioner's mill before the stream was taken, has testified at length and in detail as to what it would cost to produce steam power at this mill, and then says that to produce it with a new steam plant and under the most favorable condi-

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tions would cost somewhat less than the amount he has stated, as he made his estimates of the cost under existing conditions at the mill, and if he further says that he then cannot state how much less, the presiding judge may in his discretion order the testimony to be stricken out and give the witness an opportunity to present another estimate later. In making an estimate of the cost of production of power, as the basis of a general assessment of damages for all time, the best test would be the cost under the most favorable conditions, and not under conditions merely temporary.

At the trial of a petition by a mill owner for damages from the taking of a stream as a water supply, on the issue of the value of the waters for purposes of power, the presiding judge in his discretion properly may exclude the opinion of a witness founded wholly on the value of the plant of his own mill farther down the stream arrived at from an offer made for it.

At the trial of a petition by a mill owner for damages from the taking of a stream as a water supply, the petitioner cannot ask the trustee of a savings bank at what rate of interest, at the time of the taking, money could be invested safely for a long term of years, this being too remote and too uncertain to be of assistance in assessing the damages.

At the trial of a petition by the owner of a mill in a small town for damages from the taking of a stream as a water supply, on the issue of the value of the waters for purposes of power, the presiding judge properly may exclude the testimony of a witness as to the value of power in a certain city, in the absence of evidence that the value of power in the small town where the petitioner's mill is situated is the same as its value in the city.

PETITION, filed June 4, 1903, to the Superior Court for a trial by jury to determine the damages to which the petitioner was entitled incidental to the use and value of the waters of Kettle Brook for purposes of power, including any unoccupied fall, from the taking of the waters of that stream by the city of Worcester under St. 1895, c. 384, to increase its water supply.

In the Superior Court the case was tried before *Pierce*, J. The jury found for the petitioner and assessed damages in the sum of $21,984.54. The petitioner alleged exceptions to certain rulings of the judge and to the exclusion of certain evidence, raising the questions stated by the court.

C. M. Rice, for the petitioner.

A. P. Rugg, (*J. F. Humes* with him,) for the respondent.

KNOWLTON, C. J. This was a petition to recover damages for the taking of the waters of Kettle Brook, under the St. 1895, c. 384. The taking included all the waters of the brook at the petitioner's woollen factory, and above it, together with the factory itself, the dam, the pond and lands around it, and certain lands of other parties. The petitioner and the respondent agreed to divide the damages into two parts for the purpose

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of assessment, and submitted to three referees the petitioner's claim for damages "sustained by the taking of land, water and water rights, and by the construction of any aqueducts, reservoirs or other works in relation to the waters of Kettle Brook, . . . except the damages incidental to the use and value of the waters of said Kettle Brook for purposes of power, including any unoccupied fall or power that may be damaged by said taking," etc. Under the submission these referees awarded a certain sum as damages, which was paid. The claim for the remaining damages was heard before commissioners under the statutes, and the petitioner afterward demanded a trial by jury in the Superior Court. The case is before us on exceptions taken by the petitioner at this trial.

The important question is how the exception in the submission which defines the petitioner's present claim is to be construed in its application to certain facts. This claim is for "damages incidental to the use and value of the waters of said Kettle Brook for purposes of power, including any unoccupied fall or power that may be damaged by said taking." The claim formerly considered was for all other damages caused by this taking. There is nothing in the record to show that damages were claimed by the petitioner for any injury to property which was not taken, and it would seem, therefore, that the intention was to divide the value of all that was taken into two parts, and to have the value of the use of the waters for the purposes of power assessed in one sum, and the value of everything else that was taken assessed in another sum. Of course the value of each part was to be assessed in reference to the fact that, at the time of the taking, it was connected and used with the other. If either part had been taken without taking the other, the claim for damages would have been not only for the fair value of the part taken, but also for the injury to that which was left, by reason of the taking of that which was essential to its profitable use. In that case, the damage for injury to that which was left would be incidental, in a sense, to the taking of the other part. If the use of the water and nothing else was taken, the dam and water wheel and the rights of flowage over lands of other persons would become of little value, and the mill and the machinery would be greatly

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reduced in value, unless power from another source could be procured to operate them. So, if everything but the use of the water was taken, the right to this use would be worthless without ownership of the land, and the damage for the taking of the land would include the incidental damage to the right to use the water. We do not think the parties intended that this kind of damage should be assessed as incidental to the taking of either part of the property, but that the assessment for each part should be at its fair value as a part of the whole, thus dividing the entire damages represented by the value of all that was taken into two parts, proportional to the values of the respective classes of property for which the assessments were to be made. The diminution in value in the parts of the property which had been procured or constructed in order to make the right to use the water available was not a damage incidental to the taking of the right to use the water, because these parts of the property were also taken, and were to be paid for by the respondent. This conclusion furnishes a ground on which we may dispose of several of the important exceptions.

Another question grows out of the fact that, at various points on the stream above the petitioner's mill, reservoirs had been constructed and used by riparian proprietors, in a reasonable way, and in the exercise of their rights as such proprietors, to hold back the water and equalize and increase the power at their mills. Several of these had been in existence for many years, and the use of them, over which the petitioner exercised no control, materially increased the power at its mill. The petitioner contended that it had a legal right to have these reservoirs continued and used as they had been used; but the respondent contended and the judge ruled that the petitioner had acquired and could acquire no prescriptive rights to have the reservoirs maintained and used as the owners of them had been accustomed to use them, and that the value of its power must be determined in reference to this fact. This was plainly correct, and the exceptions founded upon an assumption to the contrary must be overruled. *Thurber* v. *Martin*, 2 Gray, 394. *Gould* v. *Boston Duck Co.* 13 Gray, 442. *Springfield* v. *Harris*, 4 Allen, 494. *Vliet* v. *Sherwood*, 35 Wis. 229. *Crawford Co.* v. *Hall*, 60 L. R. A. 889, 909. The judge, however, instructed the

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jury as follows: "You have the right to take into consideration in determining the amount of natural water power which would be developed on this stream, the watershed, the situation of the privileges as they are along down, the fact that there were reservoirs at that time in 1895, and had been, and the various configurations and conditions relating to that shed and that power including therein of course the nature of the soil, its adaptability, its capacity for holding water, the question whether the swamps would retain water upon any part of the watershed, the question whether or not there are trees, the question whether or not there are springs upon the land, and everything else which existed as has appeared in the testimony in this case, which will enable you to come to the conclusion as to not only the amount of water which would naturally fall upon that shed from the clouds, but those things which are related to its conservation and preservation and its continued flow." He further instructed them as to these upper reservoirs that they could continue "as long as the owners saw fit to have them continue, . . . that the waters which were contained in them could not be sent down in unreasonable bodies at any time, and that the privileges which were below could not be flooded, neither could the waters be unduly retained."

The first request for instructions was that the petitioner's right to use and maintain its dam and its flowage rights was not included in the former submission, and that the damages for the taking of these rights were to be assessed in this suit. This is covered by the first proposition which we have stated as to the construction of the agreement of submission. These flowage rights were rights in the lands of others, conveyed by deeds. They and the dam and the right to maintain it were parts of the property which were to be considered and paid for under the first reference.

The second and third requests were, that if the substitution of steam power for water power was an economical and proper mode of repairing the damage at the privilege, due to the taking of the water, and if the use of the mill privilege for manufacturing purposes, with steam power substituted for the water power taken, would, after the taking, have been a reasonable and proper mode of using the property to obtain the best

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financial results, then the measure of the petitioner's damages due solely to the taking of the water power, "is the cost of producing annually a full equivalent therefor by the substitution of steam power for the water power taken as aforesaid." While this would be a proper subject for the consideration of the jury, we should be slow to say as a matter of law that the measure of damages was the cost that might result from a certain reasonable and economical mode of repairing the damage, to the exclusion of every other reasonable and proper mode, the financial result of which might not be precisely the same. Besides, the proposed instruction assumed that the present conditions would remain unchanged in the future.

A separate and independent answer to the request is that, because of expensive buildings and machinery upon the property, adapted to the manufacture of a particular kind of goods, which would be of little value without power, it might be economical, if the power was taken and the remainder left, to procure another kind of power, even at a great expense, rather than to suffer a heavy loss on the mill and the machinery. In such a case the great cost of the new kind of power would represent, not the fair value of the power, taken as a part of the whole property, on the basis of its proportional part of the value of the whole, but it would represent the value of the power taken, together with an additional sum made necessary on account of the damage which would otherwise come to the property which was left. As no property was left in this case, such damage is not to be assessed in determining the damage for taking the power.

For the same reason, it would have been erroneous for the judge to give the ninth instruction requested. In the case supposed the assessment suggested in the request would have given the value of the property taken, with an additional sum for the damage to the remaining property.

The fourth, fifth, sixth and seventh requests for rulings are all founded upon the contention that the petitioner was entitled to have the reservoirs, on the stream above, managed and used in the future as they had been in the past, which, as we have already said, was erroneous.

The eighth request was that upon all the facts of the case,

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it was competent for the jury "to ascertain what amount of money invested at a reasonable rate of interest would produce an annual income amounting to the annual cost of replacing the amount of water power taken away by substituting steam or other power for the water power so taken." This is, in substance, a request to instruct upon a part of the evidence, and to say that there is a possible view of the evidence which would warrant a jury in coming to a certain result. An instruction of this kind, without more, would usually be confusing, and thus misleading. The court is not called upon to instruct in this way. *Hicks* v. *New York, New Haven, & Hartford Railroad*, 164 Mass. 424, 428, and cases cited. The jury were told that they might consider the subject of substitution of other power for the water power, and the cost of such substitution, if they found this method reasonable.

The remaining exceptions are to the exclusion of evidence. The award of Ball and Buttrick and the use of the water in accordance with it had reference to a reservoir below the petitioner's mill, which received a part of its water from a watershed which did not supply the petitioner's pond. It was rightly excluded, as being too remote to be of assistance to the jury.

The petitioner inquired of one Allen if he had computed the amount of power that could be developed by the petitioner's plant, taking into account the natural flow of the watershed, as regulated by the several reservoirs, etc., and asked what would be the average daily yield in horse power from that shed, including the reservoirs. The form of the questions as to what "could be developed," and what would be the "average daily yield," indicates that the question was put under the petitioner's contention that it had a right to control the future use of the reservoirs, in accordance with the manner of their former use, in the development of its power, which, as we have said, was erroneous. The average daily yield, including times of the highest water and of the lowest, would not fairly represent the usual available power. A witness testified that "at certain seasons of the year a very large volume of water would come down over the watershed, a very much larger volume of water than at other seasons of the year, and when the pond was filled so it would run over the flash boards they would put on full gate

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and run full gate, which took a great deal more than the natural flow of the stream and they ran the mill some nights all night, and by the operation of the mill over time and by using open gate they were able to manage the surplus of water in the wet seasons." There was other testimony as to the usual amount of water power used at the mill. We are of opinion that the petitioner cannot justly complain of the exclusion of this question.

The witness Hill was a mechanical engineer of large experience, especially in connection with steam engines and the production of power by steam He testified that he had made tests of the engines at the petitioner's mill before the water was taken. It did not appear that he had any knowledge of values in that neighborhood, except that of a mechanical engineer. He was asked to state, from his knowledge of the cost of producing horse power in that locality and in other localities, what was the value of power there per horse power. The question was excluded, but he was permitted to give the cost of producing it. The witness Tolman had been a partner of the last witness, and was a mechanical engineer who testified to a large experience with steam power. It did not appear that he had any knowledge of the value of power in the vicinity of the petitioner's mill, except that derived from his knowledge of the cost of producing it. He was asked the market value of power per horse power at the petitioner's mill previous to the taking, and the question was excluded. He was permitted to testify as to the cost of producing power at that place by steam or any other method. The witnesses Allen and Shedd were experts in hydraulic engineering, and in that capacity were familiar with the cost and value of water power and steam power; but it did not appear that either of them had any knowledge of the value of real estate in the town of Leicester, where the petitioner's mill was situated, or elsewhere, or that they knew of any sales of power apart from land. These witnesses were asked to give an opinion as to the value of the waters of Kettle Brook, and as to the damage to the petitioner's property caused by the taking of the water. For the reasons stated in *Conness* v. *Commonwealth*, 184 Mass. 541, it was within the discretion of the presiding judge to exclude these questions to the several witnesses; and so far as appears, the discretion was properly exercised. The

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witness Hill having testified at length and in detail as to what it would cost to produce steam power at this mill, said that to produce it with a new steam plant and under the most favorable conditions would cost somewhat less than the amount he had stated, as he had made his estimates of the cost under existing conditions at the mill. Having said that he could not then state how much less, his testimony was stricken out on motion of the respondent, and he was given an opportunity to present another estimate later. It was within the discretion of the presiding judge to make this order. In making an estimate of the cost of production of power, as a foundation for an assessment of damages in gross, the best test would be the cost under the most favorable conditions. While the cost with the inferior engine then in use might be pertinent in reference to the damage for a time, before a better engine could be substituted economically, it would be misleading if made a basis for a general assessment for all time. What we have said on this point applies also to the testimony of the witness Tolman.

The witness Olney was called to testify generally as to the damages in question; but he said his opinion was founded wholly on the value of his own plant, which was a mill farther down the stream, and that he arrived at the value of that from an offer which had been made for it. The judge might well find that he was not an expert in the value of real estate, or qualified to give the opinion asked for.

What it would cost to reproduce the dam was immaterial to the inquiry before the court. The dam, the land under the pond and the flowage rights in the lands of others, were a part of the property for which damages were to be assessed in the former reference. The use of the water for power, with any unoccupied fall that might be damaged, was the only property to be paid for by this assessment. For this reason the petitioner's evidence of a special value in the water for washing and scouring was also rightly excluded.

The question to the trustee of a savings bank as to the rate of interest at which money could be invested safely for a long term of years was too remote to be of assistance. The percentage of income that can be obtained from investments changes from time to time, as everybody knows, and the inquiry as to an

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investment for a given term of years, would introduce an element of too much uncertainty, in various particulars, to be helpful upon the question of damages.*

No error is shown in the exclusion of the testimony of the witness Ely as to the value of power in the city of Worcester. It does not appear that the value of power in the small town where the petitioner's mill was situated was the same as its value in the city of Worcester.

Exceptions overruled.

CHARLES W. WOOD & another *vs.* CHARLES T. SHERER.

Worcester. October 6, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, & BRALEY, JJ.

Contract, Account stated. *Accord.*

In an action by an attorney at law for compensation for professional services, with a count upon an account stated and another count upon an account annexed for a larger sum, it appeared that the parties agreed upon a settlement by the payment of the sum named in the count upon an account stated and by the passing of receipts, that the defendant said that he would give a check on the spot but neither party had a blank check on the defendant's bank, that for a number of days the plaintiff expected to receive the check and the defendant made promises to send it, and that before bringing his action the plaintiff notified the defendant that unless he received the check by a certain day he should sue. *Held*, that upon this evidence it could not be ruled as matter of law, either that the settlement was conditional or that the defendant procured it by a fraudulent promise to give a check on the spot, and the plaintiff was allowed to recover only the sum named in his count upon an account stated.

CONTRACT by attorneys at law for compensation for professional services, originally upon an account annexed for $2,293. Writ dated May 26, 1903.

In the Superior Court the case was tried before *Gaskill*, J., upon an auditor's report. The judge allowed the plaintiffs to amend their declaration by adding a second count upon an ac-

* The petitioner argued, that this evidence was admissible to show the jury what rate of interest they ought to use in computing the principal sum which would yield an annual income equal to the annual cost of replacing the water power by steam.

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count stated, alleging an accounting together on March 23, 1903, and a balance of $500 then found due to the plaintiffs. It was agreed that the services rendered, which were declared upon in the first count, were the subject of the interview between the parties set forth in detail in the auditor's report, and the plaintiffs stated that the second count involved no other or different claim for services than the items contained in the first count.

It was contended by the defendant that the plaintiffs having pleaded an account stated, for the same cause of action as the account annexed, and the defendant having admitted the account stated and having consented to judgment thereon, no judgment could be rendered upon the first count.

It was agreed that the case should be submitted on the pleadings and the auditor's report, and that the judge might order a verdict for the amount of $527.17 or for the other amount of $2,317.97.

The judge thereupon ordered a verdict for the sum of $500 with interest from March 23, 1903, amounting in all to $527.17; and, at the plaintiffs' request, reported the case for determination by this court. If the judge was correct in this ruling the verdict was to stand; if not, the case was to be remanded to the Superior Court.

R. Hoar, for the plaintiffs.

H. S. Haskell, *M. M. Taylor* & *R. B. Dodge*, for the defendant.

BARKER, J. As the pleadings stood when the verdict for $500 and interest was ordered, the parties both alleged that on March 23, 1903, they had an accounting together and a mutual settlement of the demands in suit and found the sum of $500 to be due from the defendant to the plaintiffs and that the defendant then promised to pay that sum. It is difficult to see how either party could contradict what both had alleged in pleading. See *Snowling* v. *Plummer Granite Co.* 108 Mass. 100, 101. There was no allegation in pleading on the part of the plaintiffs that this mutual settlement was void for fraud on the part of the defendant, nor does the report show that such a contention was made at the trial. The case was submitted on the pleadings and the auditor's report with the agreement that the presiding judge might order a verdict for the amount of the sum agreed between

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the parties on March 23, 1903, with interest, or for the amount of $2,317.97, which represented the whole demand sued for, with interest. The auditor's report set forth a detailed statement of the interview of March 23, 1903, which the auditor's report states as the testimony before him of one of the plaintiffs. That evidence tends to show that the parties agreed upon a settlement by the payment of the sum of $500 by the defendant to the plaintiffs and the passing of receipts.

When that sum was proposed the defendant said he would give a check on the spot, and there is no doubt that the plaintiffs expected him to make payment in that way when they acceded to a settlement for that sum. Because neither party had a blank check on the defendant's bank he did not give a check on the spot. But the evidence tended to show also that for a number of days thereafter the plaintiffs expected to receive the check and that the defendant made other promises to send it, and that four days before suing out the writ the plaintiffs notified the defendant that unless they received the check by a certain day they would sue.

Upon the terms of the report we think the verdict must stand unless as matter of law the presiding judge was bound to order a verdict for the larger sum, or unless, in other words, the evidence showed conclusively that the settlement was a conditional one, or that the defendant procured it by fraud. In our opinion it cannot be ruled upon the evidence, as matter of law, either that the settlement was conditional, or that the defendant procured it by a fraudulent promise to give a check on the spot.

Judgment on the verdict.

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MICHAEL NEEDHAM *vs.* CHRISTOPHER C. STONE & others.

Worcester. October 6, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, & BRALEY, JJ.

Negligence, Employer's liability.

The proprietor of a foundry is not liable at common law to an employee for the loss of an eye hit by a chip of metal flying from the head of a cutter, if the cutter was selected by a fellow servant, and the employer furnished proper and suitable cutters in sufficient numbers for the work.

TORT by a workman in the defendants' foundry, for the loss of an eye from the alleged negligence of the defendants in failing to furnish a proper or suitable cutter or cutting chisel for chipping particles of metal from castings. Writ dated December 13, 1902.

At the trial in the Superior Court *Gaskill*, J. at the close of the evidence ruled that there was no evidence to warrant a verdict for the plaintiff and ordered a verdict for the defendants. The plaintiff alleged exceptions.

J. E. McConnell & P. F. Ward, for the plaintiff.

H. Parker, C. C. Milton & H. H. Fuller, for the defendants.

BARKER, J. The plaintiff and a fellow workman were cleaning a casting in the defendants' foundry. The process was for one workman to hold the edge of a cutter next to the projection to be removed from the casting and for the other workman to strike the head of the cutter with a hammer. The cutter had a wooden handle inserted in it similar to that of an ordinary hammer. The pieces removed from the casting would be made to fly off by the force of the blow. The blows of the hammer also tended to knock off bits of the head of the cutter, and it was the plaintiff's contention that a piece of the cutter's head flew up and entered his eye, causing the injury for which he sought compensation. A count under the employers' liability act was waived, and the trial proceeded under the common law count. At the close of the evidence a verdict was ordered for the defendants, and the case is here upon the plaintiff's exception to that order.

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The negligence alleged was a failure to furnish and keep in repair proper tools, and the defect in tools was alleged to be a loose handle in the cutter and a battered and worn condition of its head.

The undisputed evidence showed that there were upon the premises for the use of the workmen about a dozen cutters, and that the selection of the one in use at the time of the accident was made from several of them by a fellow servant of the plaintiff, who took it from among a number because it was pointed. There is nothing in the evidence to indicate that the other cutters were not free from the defects relied on by the plaintiff. There was no evidence that the handle of the cutter was loose at the time, or that a looseness of the handle would tend to cause the accident. The fellow servant who selected the cutter testified that he picked it out because it was newly pointed, and that the cutters from among which he selected it were in the blacksmith shop. The evidence was that the blacksmith shop was the place for a man to go and get a cutter if he needed one. The cutter itself was put in evidence, and from its appearance it could be inferred that pieces had been knocked from its head by the blows of a hammer when the cutter was in use. There was uncontradicted testimony from one of the defendants tending to show that there was no greater probability or possibility of chips flying from a cutter in the condition of the one in evidence than from one just from the hands of the manufacturer, and that the first blow of the hammer may split scales from a cutter. There was also uncontradicted evidence tending to show that the blacksmith had charge to see that such tools or appliances were in suitable condition. Upon this state of the evidence we are of opinion that it could not be found that there was any want of due care on the part of the defendants to furnish and keep in order proper and suitable cutters in sufficient numbers for the work, and that if there was any negligence in the selection of the cutter in use it was the fault of the plaintiff's fellow servant who made the selection. See *Johnson* v. *Boston Towboat Co.* 135 Mass. 209; *Carroll* v. *Western Union Telegraph Co.* 160 Mass. 152; *Allen* v. *Smith Iron Co.* 160 Mass. 557.

Exceptions overruled.

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KATHERINE A. FLAHERTY *vs.* BOSTON AND MAINE RAILROAD.

Worcester. October 6, 1904. — October 18, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, & BRALEY, JJ.

Negligence. Railroad.

If it is a fault on the part of a railroad company, that none of its servants helped in putting two children and a bag into a car of a train, when no request to do so was made by the mother of the children having them in charge, such fault is too remote to make the company liable for an injury to the woman while stepping from the train when it was in motion after putting the children and the bag on board.

If a woman, who enters a car of a railroad train, not as a passenger, but to help her two children and to place in the car a bag to go with them, attempts to leave the train after it has started and is injured, she cannot recover from the railroad company on the ground that a brakeman, when she found the gate of the platform closed, beckoned her to the next platform, saying as he helped her down the steps "It is all right, not going very fast; be careful." If this can be found to be negligence on the part of the railroad company, the circumstances which make it negligence also make the woman's own act contributory negligence.

TORT for personal injuries from the alleged negligence of the defendant's servants, at a station of the defendant at Lincoln Square in Worcester, in starting a train before the plaintiff had alighted, and inviting and assisting her to alight after the train began to move. Writ dated December 18, 1902.

At the trial in the Superior Court *Bond*, J. at the close of the evidence ruled that the plaintiff was not entitled to recover, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

C. E. Tupper, for the plaintiff, submitted a brief.

C. M. Thayer, (*A. H. Bullock* with him,) for the defendant.

BARKER, J. While a train was stopped at a station the plaintiff entered a car. She had no ticket and did not intend to travel, but to help her two children who took the train as passengers and to place in the car a bag which was to go with the children. She was the last person other than the train men to get upon the train, and she gave no notice to any one that she did not intend to become a passenger. Before she left the

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interior of the car the usual preparations for starting the train had been made, if it was not then in motion. When she came out of the door of the car its platform gates had been closed, and she found, directly opposite her, and with his hand on the gate, a brakeman to whom she said "I want to get off the train." By a gesture he invited her to the next platform, took hold of her elbow, and assisted her down the step, saying, "It is all right, not going very fast; be careful." As she stepped off the car which was moving slowly she fell and was hurt. The suit is to recover compensation for her injury. A verdict was ordered for the defendant, and the case is here upon her exception to that order.

Upon her own testimony she had done nothing up to the time when she appeared to the brakeman and told him that she wished to get off which could indicate to the train men that she intended to get off at that station. She contends that some servant of the defendant should have helped her in placing the children and the bag in the car. But she made no request for such aid, and the failure to render it, if a fault of the station men or the train men, was too remote to be in any sense the cause of her injury. We find no evidence of negligence in the starting of the train when it was set in motion, nor is it contended that there was any jolt or jerk.

It is settled by *Lucas* v. *New Bedford & Taunton Railroad*, 6 Gray, 64, that she was not entitled to the rights of a passenger, or to any extraordinary care on the part of the defendant, and that if her attempt to leave the train while it was in motion was the cause of or contributed in any degree to the accident she cannot recover. But she contends that the action of the brakeman in beckoning her to the next platform and in saying as he helped her down the steps, "It is all right, not going very fast; be careful" was negligence on the part of the defendant. If it could be so found, the circumstances which made it negligence were obvious and made it contributory negligence on her part to attempt to leave the train while it was in motion. *Lucas* v. *New Bedford & Taunton Railroad*, *ubi supra*. Her relation to the defendant not being that of a passenger, she having made no request to have the train stopped, not having been ejected from it or injured until she stepped from it of her own choice, she

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cannot recover even if the brakeman was negligent. There was no evidence which would justify a finding either that she acted under any misapprehension or compulsion, or that she was in a condition in which her conduct was not to be judged by the ordinary standard of care.

Exceptions overruled.

JEREMIAH SHEA *vs.* FRANCIS A. McCAULIFF.

Worcester. October 5, 1904. — October 20, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, & BRALEY, JJ.

Landlord and Tenant. Agency.

While a lease to A. and B. was in force the lessor made a new lease to A. alone, for a longer term at an increased rent. In the new lease was a stipulation that all rents received on account of the first lease should be credited as part payment under the new lease. *Held*, that, even if the second lease operated as a grant of the reversion, the lessor reserved the right to the rent payable under the first lease and the obligation of A. and B. thereunder remained intact.

A. and B. were partners and as such held a lease. A. sold his interest in the partnership assets to B. and took from him a bond to save him harmless from any debts or liabilities of the late firm. While B. was in possession of the leased premises paying rent to the lessor, the lessor made a new lease to A. alone, for a longer term at an increased rent, with a stipulation that all rents received on account of the first lease should be credited as part payments under the second lease. After the execution of the new lease B. paid no rent to the lessor but paid rent to A. upon bills presented in A.'s name, and no demand for payment was made except by A. Later, before the expiration of the first lease, B. after notice to A. vacated the premises and refused to pay further rent. A. paid his rent under the new lease, and at the expiration of the term of the first lease sued B. on his bond for the amount of rent paid by A. which was due under the old lease from the time B. vacated the premises until the end of the term. A judge, sitting without a jury, found for the plaintiff. *Held*, that the finding was justified; that the second lease, whether a grant of the reversion or not, reserved the rent under the first lease, and, this being so, the judge might have found that A. in collecting the rent from B. in his own name in reality was acting as the agent of the lessor, and that in paying the rent under the second lease, after the default of B., A. was paying a debt of the late firm in discharging its obligations to the lessor under the first lease, which made B. liable on his bond.

CONTRACT on a bond by which the defendant agreed to indemnify the plaintiff and save him harmless from any debts, obligations or other liabilities of the late firm of F. A. McCauliff

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and Company, of which the plaintiff had been a member, claiming $653.48 paid by the plaintiff as rent reserved under a lease from Dorothy S. Bailey and others to F. A. McCauliff and Company from October 1, 1900, to January 1, 1902, with interest. Writ dated March 15, 1902.

In the Superior Court the case was tried before *Fox*, J., without a jury. He found the following facts:

Before July 12, 1897, the plaintiff and the defendant were copartners in the business of quarrying granite under the firm name of F. A. McCauliff and Company, and on that date the plaintiff sold his interest in the partnership assets to the defendant, and took from him the bond sued on. At that time the plaintiff and the defendant held a lease from Bailey and others of the quarry property, calling for payments of $500 a year, payable quarterly. This lease expired by its terms on January 1, 1902. The defendant continued in possession of the premises, paying rent to the lessors, until April 1, 1899. On March 1, 1899, the lessors made another lease covering these premises and other premises to the plaintiff for a term of seven years, upon the rental of $2,000 a year payable in monthly instalments. The lease contained this provision: "The above premises are subject to a lease given to Francis A. McCauliff and Jeremiah Shea, which expires January 1, 1902, and all rents received on account of said lease are to be credited as part payment under the terms of this lease."

The defendant continued to occupy the quarry until October 1, 1900, and after the execution of the new lease to the plaintiff paid to the plaintiff the rent reserved under the first lease, the bills being presented in the plaintiff's name. In July, 1900, the defendant gave the plaintiff notice that he should vacate the premises on October 1 following, and did so. No demand upon the defendant was made for the rent after October 1 except by the plaintiff. After the execution of the lease of March 1, 1899, to the plaintiff, the plaintiff paid to Bailey the rent called for by that lease down to January 1, 1902, making no payments expressly on account of the old lease. Before January 1, 1902, the plaintiff did not occupy the premises covered by the old lease unless such occupation is legally to be implied from his acceptance of the new lease, nor was there any evidence of any

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waiver of his rights against the defendant, unless such waiver is to be found in the facts above stated.

The judge found for the plaintiff, and, with the consent of the parties, reported the case for determination by this court. If upon the facts found by the judge the plaintiff was entitled to recover, judgment was to be entered on the finding; otherwise, judgment was to be entered for the defendant, or such other order was to be made as justice might require.

C. A. Babbitt, for the plaintiff.

J. H. McMahon, for the defendant.

HAMMOND, J. The lease to the plaintiff recites that it is subject to the prior lease to McCauliff and Shea, and provides that "all rents received on account of said lease are to be credited as part payment under the terms of this lease" [the lease to the plaintiff]. It is plain that the word "received" means received by the lessors, and the language fairly implies that the rent to accrue under the prior lease was to remain payable to them notwithstanding the second lease. A lessor may assign the rent to become due upon a lease without granting the reversion, or he may grant the reversion and reserve the rent. *Hunt* v. *Thompson*, 2 Allen, 341. *Leonard* v. *Burgess*, 16 Wis. 41. Taylor, Land. & Ten. § 426, and cases cited. Even if this second lease is to be taken as a grant of the reversion, the lessors still reserved the right to the rent payable under the first lease, or, in other words, they reserved the rent, and hence the obligation of F. A. McCauliff and Company to pay to them the rent remained intact. In this respect this case differs materially from *Harmon* v. *Flanagan*, 123 Mass. 288, in which the rent was assigned with the reversion.

While, after the execution of the second lease McCauliff paid no rent to his lessors but paid rent only to the plaintiff upon bills presented in the plaintiff's name, and while after October 1, 1900, no demand for the rent was made upon McCauliff except by the plaintiff, yet, notwithstanding all this, the judge, in view of the fact of the reservation of the rent, may have found that in collecting the rent from McCauliff the plaintiff was in reality acting as the agent of the lessors, and also that, in paying to the lessors the sums which were payable under the first lease after the default of McCauliff, he was paying a debt

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of the late firm of F. A. McCauliff and Company, and to that extent discharging its obligations to the lessors under the first lease. Such a finding brings the case within the condition of the bond.

Judgment on the finding.

JENNIE E. HOFFMAN, administratrix (substituted by amendment) *vs.* LAFAYETTE B. HOLT.

Worcester. October 5, 1904. — October 24, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Employer's liability.

The act of one of two house painters, in attempting to hold the foot of a ladder while the other is upon it and negligently letting it slip, is not an act of superintendence but of simple manual labor, even if the painter guilty of the negligence is otherwise a superintendent within the meaning of the employers' liability act.

TORT for personal injuries received by the plaintiff's intestate, in the manner described in the opinion, while in the defendant's employ, the original plaintiff having been the intestate, who died while the action was pending, the administratrix being substituted as plaintiff by amendment. Writ dated April 4, 1901.

In the Superior Court the case was tried before *Gaskill*, J., who at the close of the evidence ordered a verdict for the defendant, and reported the case for determination by this court. If the plaintiff was entitled to go to the jury upon the evidence introduced, judgment was to be entered for the plaintiff in the sum of $8,000; otherwise, judgment was to be entered on the verdict.

G. R. Warfield, for the plaintiff.

C. C. Milton, for the defendant.

BARKER, J. The plaintiff's intestate was hurt by reason of the slipping of a ladder. At the time he and one other person only were at work and the particular thing then in hand was the nailing of a cleat upon a ladder which they were to use in painting a roof. He was upon the ladder nailing the cleat, and the other person was holding the foot of the ladder. Both of these

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two persons were in the employment of the defendant as painters, and both were expected to paint; but Donovan the person who held the foot of the ladder and caused the accident by letting the ladder slip was in charge; and when the plaintiff's intestate was taken to the place where the painting was to be done, the defendant took him there and told him that Donovan was there and had charge of the job and would tell the plaintiff's intestate what to do, and that the defendant then went away. The evidence tended to show that Donovan procured the ladder, which had no hooks or cleat to hold it to the roof; that the two put it on the main roof, that the plaintiff's intestate was to go up on the ladder and Donovan was to hold it at the bottom, and that the plaintiff's intestate went up the ladder to nail on a cleat to hold the ladder to the ridge pole; also that this method of putting on the cleat was ordered by Donovan, who said that he was strong enough to hold the ladder and that he could hold it; and also that Donovan let go his hold and the ladder slipped for that reason.

The case was tried upon one count only, for negligence of a superintendent under the employers' liability act. The count alleged that the plaintiff's intestate by the direction of Donovan was engaged in fastening a cleat upon a ladder which Donovan undertook to steady and hold while the plaintiff's intestate was at work upon it, and that Donovan carelessly released his hold upon the ladder and allowed it to slip.

At the close of the evidence a verdict for the defendant was directed, and the case is before us upon a report.

We do not consider whether upon the evidence Donovan could be found to be a superintendent within the meaning of the statute. See *Adasken* v. *Gilbert*, 165 Mass. 443. Although in charge of the job, he was expected to work as a painter. He was mixing paint when the plaintiff's intestate arrived. On other jobs for the same employer although Donovan gave instructions he worked by the side of the other painters, beginning work at the same time with the other men, working the same hours, taking his place beside them on ladder or staging and painting with them whenever there was room. Whether his wages were higher does not appear. We think the verdict for the defendant was ordered rightly because Donovan's act in re-

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leasing his hold upon the ladder and allowing it to slip could not be found to be an act done in the exercise of superintendence.

The work of arranging and putting in place ladders and stagings for doing outside painting, proper appliances and materials being furnished by the employer, is ordinarily the concern of the workmen themselves. Here there were two men who were expected to do the same kind of manual labor. The employer himself was absent and had given no directions about ladders or stagings, leaving his employees to arrange them for themselves. Where one person acts both as a common laborer and a boss, and is expected to work with and as the other workmen, even his words of command are not necessarily acts of superintendence. See *Whittaker* v. *Bent*, 167 Mass. 588. We think that the act of Donovan in attempting to hold the ladder and letting it slip was not an act of superintendence but of simple manual labor. See *Riou* v. *Rockport Granite Co.* 171 Mass. 162; *Flynn* v. *Boston Electric Light Co.* 171 Mass. 395. The plaintiff's allegation is that Donovan carelessly and negligently released his hold and let the ladder slip, — not that he misjudged his strength or the strain which might come upon it. Therefore there was nothing to show that the order given by Donovan was negligent or his plan defective, so as to bring his own manual labor within the statute as an act of superintendence. See *Joseph* v. *George G. Whitney Co.* 177 Mass. 176; *Gibson* v. *International Trust Co.*, *ante*, 454.

Judgment on the verdict.

REUBEN M. BARNES *vs.* SHELBURNE FALLS SAVINGS BANK.

Franklin. September 27, 1904. — October 27, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Trustee Process.

Under R. L. c. 189, § 40, which provides that "if the goods, effects and credits in the hands of a person who has been adjudged a trustee are not demanded of him by force of the execution within thirty days after final judgment, they shall be liable to another attachment" or "may be recovered by the defendant," the

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demand on the execution must be made by an officer, and such a demand made by the plaintiff personally is not sufficient to preserve the rights of the plaintiff or to protect the trustee in paying him.

CONTRACT for a deposit in a savings bank with accumulations of interest thereon. Writ dated February 21, 1902.

At the trial in the Superior Court before *Maynard*, J., without a jury, it appeared, that at a previous time an action had been brought against the plaintiff by a creditor, in which the defendant was summoned as trustee; that judgment was entered against the plaintiff as defendant in that action, and the present defendant was charged as trustee; that execution issued and was presented to the present defendant by the judgment creditor personally and not by an officer; that the present defendant paid to the judgment creditor the amount standing upon its books to the credit of the present plaintiff, which was less than the amount of the execution, and the execution thereupon was delivered to the present defendant by the judgment creditor, with an indorsement thereon, signed by him, that it was fully satisfied. The present action was begun more than a year after the payment by the defendant, and thereafter the execution, indorsed as above stated, was returned into the office of the clerk of the court from which it issued.

The defendant requested the judge to rule that the action could not be maintained. The judge refused to rule as requested, and found for the plaintiff in the sum of $61.05, the amount of the deposit with the accumulations of interest thereon. The defendant alleged exceptions.

F. L. Greene, for the defendant.

S. S. Taft, for the plaintiff.

KNOWLTON, C. J. The only question in this case is whether a party adjudged a trustee of the principal defendant in trustee process, properly can pay over the amount in his hands upon a demand made upon the execution within thirty days after the judgment, if the demand is made by the plaintiff in the suit; or whether, in order to protect the trustee in paying, the execution must be put into the hands of an officer and a demand be made by him. The answer depends upon the construction of the statutes. The R. L. c. 189, § 40, is as follows: "If the goods, effects and credits in the hands of a person who has been ad-

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judged a trustee are not demanded of him by force of the execution within thirty days after final judgment, they shall be liable to another attachment, whether made before or after the judgment; or if there has been no such second attachment, they may be recovered by the defendant." To protect the rights of parties there must be a demand "by force of the execution," and the question is whether a demand made by the plaintiff holding the execution, is a demand "by force of the execution" within the meaning of the statute. The case of *Burnap* v. *Campbell*, 6 Gray, 241, decided that a payment made by a trustee to the plaintiff, after the expiration of thirty days from the final judgment, without a demand made by force of the execution, and after a suit had been brought by the principal defendant to recover the money, could not be set up as a defence to the suit. The language of the opinion goes further, and states the reason for the enactment of the statute, namely, that by a payment on an execution, which properly would be returned to the court, there would be evidence of the payment and of the satisfaction or partial satisfaction of the judgment which would protect the rights of all parties. This reason is applicable to an interpretation of the statute which requires the demand on the execution to be made by an officer. An execution is directed to an officer, who is required by the precept to return it into court. A plaintiff who keeps the execution in his own hands is under no such direction. It may happen that there are subsequent attachments of the property in the hands of the trustee. It is important that subsequent attaching creditors should have the means of ascertaining their rights. The rule as to the demand upon the execution should be the same, whether there are subsequent attaching creditors or not. The fund in the trustee's hands may be assigned after the service of the original trustee writ, and the rights of the assignee will then be involved. Even if it is not assigned, it is for the interest of the principal defendant that the payment should be made, if made at all, in such a way that the evidence of it will be open to him. The R. L. c. 189, § 41, refers to the property being "demanded of the trustee by the officer," and this provision, which was then found in the Rev. Sts. c. 109, § 45, is mentioned by Chief Justice Shaw in *Burnap* v. *Campbell*, *ubi supra*. None but collateral and subsidiary

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rights are acquired against the trustee by the original judgment, and not until after a service of the execution upon him by an officer, and the return of the execution into court, can a writ of *scire facias* be issued against him. R. L. c. 189, § 45. *Adams* v. *Cummiskey*, 4 Cush. 420. After the return of the writ of *scire facias* all defences are open to the trustee which have not previously been passed upon by the court. R. L. c. 189, § 48. *Brown* v. *Tweed*, 2 Allen, 566. *Fay* v. *Sears*, 111 Mass. 154.

As an execution is directed to an officer, who alone can give compulsory effect to the judgment of the court, it is difficult to see how anything can be done by any one else "by force of the execution." To the plaintiff, for his personal action, the execution gives no greater rights than the judgment.

We are of opinion that a demand by an officer under the R. L. c. 189, § 40, is a necessary prerequisite to the protection of the rights of the judgment creditor and the trustee.

Exceptions overruled.

HAMPDEN TRUST COMPANY, executor, *vs.* FREDERICK L. LEARY & others.

Hampden. September 27, 1904. — October 27, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Executor. Trust. Deed, Construction. *Words*, "May."

Ordinarily payments made by an executor for expenses of defending the estate from claims deemed to be unjust, of proving the will and of resisting an attack upon it by persons interested in preventing its allowance, are allowed in the executor's account as properly payable from the testator's personal estate.

A testator by his will disposed of all his personal property, which was substantial in amount. On the same day that he executed the will he had conveyed all his real estate to a trust company, which was named as executor in his will, upon certain trusts. The trust deed contained the following provision: "After my death said trustee may use as much of the income from said property as may be necessary, or the proceeds of the sale of the property, in defending my estate from any claims which it deems to be unjust, and particularly in defending any proceedings brought to invalidate this trust; also for the sustaining of said trust and the probate, or sustaining of my will dated this day, and to defend any attack against said will." The will recited the provisions of the trust deed and was made subject to them. The trust company as executor under the will in-

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cluded in its first account payments made by it for expenses of defending the estate from claims deemed to be unjust, of proving the will and of resisting an attack upon it by persons interested in preventing its allowance. The allowance of these items in the executor's account was opposed on the ground, that the trust deed made such payments a charge upon the real estate. *Held*, that the items properly were allowed in the executor's account, the words "may use" in the provision of the trust deed above quoted being permissive and not mandatory, this conclusion being strengthened by the difference in the meaning of the words "may" and "shall" as used in other clauses of the trust deed.

APPEAL from a decree of the Probate Court of the county of Hampden allowing certain items in the first account of the Hampden Trust Company as executor under the will of Samuel D. Currier, late of Springfield.

The case came on to be heard before *Hammond*, J., who reserved and reported it for determination by the full court. If the charges for payments made by the executor for expenses incurred by it in defending the estate from claims which it deemed unjust and in the probate or sustaining of the testator's will and in defending an attack against the will properly were payable by the appellee as executor, the decree of the Probate Court was to be affirmed. If such charges, or any of them, should be paid by the appellee as trustee under the trust deed, and not as executor of the will, then the case was to be referred to an assessor to determine the amount of such charges.

The clauses of the trust deed referred to in the last paragraph of the opinion, as showing the difference in the meaning of the words "may" and "shall" in those clauses, were as follows:

"Fourth. Within five years from the death of said Mary J. De Moe, said trustee shall sell and convey all of said real estate at public auction or private sale, as it deems best, and the proceeds of sale, less the amount of the mortgages or incumbrances on any of said tracts of real estate, and any property in its hands as trustee shall be disposed of and paid by said trustee as follows: one-quarter of said amount to the person who shall be at that time the Treasurer of Hampden Lodge of Ancient Free and Accepted Masons of said Springfield, to be made a part of the general funds of the lodge, and to be used for the general purposes of the lodge.

"The remaining three-fourths of said amount is to be paid to Newrie D. Winter, of said Springfield, to be his own property.

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"Fifth. Said trustee may, at any time after my death, sell and convey any and all of said trust property at its discretion, at public auction or private sale, and may invest, sell and re-invest the proceeds at its discretion.

"Sixth. Said trustee shall, at any time during my life, when requested by me in writing, sell and convey any and all of said property to such persons and for such sums as I shall designate, and the proceeds of such sale shall either remain subject to this trust or be free from it, as I shall in writing request.

"Seventh. Said trustee shall re-convey any or all of said property to me or to such persons as I shall designate, without compensation, whenever I shall so request in writing.

"Eighth. Upon a sale of any of the said property by said trustee, the purchaser shall take the property free from this trust, and shall not be answerable for the application of the purchase money.

"Ninth. After my death said trustee may use as much of the income from said property as may be necessary, or the proceeds of the sale of the property, in defending my estate from any claims which it deems to be unjust, and particularly in defending any proceedings brought to invalidate this trust; also for the sustaining of said trust and the probate, or sustaining of my will dated this day, and to defend any attack against said will."

"Eleventh. Said trustee may retain out of the income or proceeds of sale, a reasonable sum for its services, for counsel fees and for its expenses, and the services of agents, and is only to be liable for its own wilful misconduct, negligence or default and not for the misconduct, negligence or default of its agents selected with reasonable care and diligence."

J. B. Carroll & W. H. McClintock, for the appellants.

S. S. Taft & E. P. Kendrick, for the appellee.

KNOWLTON, C. J. This is an appeal from a decree of the Probate Court, allowing an executor's account. The only items which are objected to by the appellants are for payments made by the executor for expenses of defending the estate from claims which were deemed unjust, and of proving the will, and of resisting an attack upon it by persons interested in preventing its allowance. No question is made in regard to the amount of

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the items if they were properly chargeable in the executor's account. Plainly they are of a kind that ordinarily are allowed in the accounts of executors, and are properly payable out of the personal estate of testators. R. L. c. 140, § 8; c. 146, § 1. *Hewes* v. *Dehon*, 3 Gray, 205.

The objection to their allowance is founded entirely upon the fact that, on the same day on which the will was executed, the testator made a deed of his real estate to the trust company which was named in the will as executor, conveying all his real estate upon certain trusts. The ninth clause of the deed is as follows: "After my death said trustee may use as much of the income from said property as may be necessary, or the proceeds of the sale of the property, in defending my estate from any claims which it deems to be unjust, and particularly in defending any proceedings brought to invalidate this trust; also for the sustaining of said trust and the probate, or sustaining of my will dated this day, and to defend any attack against said will." The will recites the provisions of the deed of trust and is made subject to them, with a scheme for the disposition of the property conveyed by the deed, in case the deed should be set aside. The testator had a substantial amount of personal property which was disposed of by the will. No proceedings were brought to set aside the deed, except so far as its validity was involved in the controversy as to the validity of the will.

The account was rightly allowed, unless the ninth clause of the deed made the expenses of sustaining the will, in view of the objections to it, a charge upon the real estate conveyed in trust which it was the duty of the trustee to pay out of the trust property. The appellants contend that the word "may" in the ninth clause of the deed, taken in connection with the will and the other parts of the deed, must be held to mean "must."

We will not pass upon the contention of the executor that, even if the trustee ultimately should pay these expenses under the deed, they should still be allowed first in the executor's account, as primarily chargeable upon the estate left by the testator. But we will assume, without deciding, that inasmuch as the same corporation is both trustee and executor, if these sums were to be paid out of the trust property the corporation would be chargeable in its executor's account for an amount as

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assets of the estate equal to the sum which it ought to have paid as trustee for the benefit of the estate held by the executor.

It is a familiar rule of law that the language of a written instrument is ordinarily to be construed according to its plain and natural meaning. This rule applies unless there is something in the particular case which obliges the court to give the words a different meaning. *Minor* v. *Mechanics Bank*, 1 Pet. 46, 64. *Moran* v. *Prather*, 23 Wall. 492, 501. *Hill* v. *Hill*, [1897] 1 Q. B. 483, 486. *Mallan* v. *May*, 13 M. & W. 511, 517. The word "may," in its primary and common use, is enabling only, not imperative. *Commonwealth* v. *Haynes*, 107 Mass. 194, 197. *Commonwealth* v. *Chance*, 174 Mass. 245, 247. *Newburg Turnpike Co.* v. *Miller*, 5 Johns. 101, 113. *Williams* v. *People*, 24 N. Y. 405, 409. *McIntyre* v. *McIntyre*, 123 Penn. St. 329. *Lovell* v. *Wheaton*, 11 Minn. 92, 101. A different meaning is sometimes given to it in the construction of statutes, where the rule seems to be, "that the word 'may' means 'must' or 'shall,' only in cases where the public interest and rights are concerned, and where the public or third persons have a claim, *de jure*, that the power should be exercised." *Newburg Turnpike Co.* v. *Miller*, *ubi supra*. *State* v. *Sweetsir*, 53 Maine, 438, 440. *Bolling* v. *Mayor of Petersburg*, 3 Rand. (Va.) 563, 580.

In view of these familiar rules of construction, and especially when we notice the difference in the meaning of the words "may" and "shall" in clauses four, five, six, seven, eight, nine and eleven of this deed, we think it quite plain that the deed does not require the trustee to pay these expenses out of the trust estate, and that therefore the items objected to were rightly allowed in the executor's account.

Decree affirmed.

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CARRIE C. BLANCHARD *vs.* HOLYOKE STREET RAILWAY COMPANY.

Hampden. September 27, 1904. — October 27, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Practice, Civil, View of plaintiff, Conduct of trial.

In an action for personal injuries, it is within the discretion of the presiding judge to refuse to permit the jury to take a view of the plaintiff at her home, in order to judge of the extent of her injuries, upon a statement of her counsel made before the trial that she is unable to come into court to testify except upon a stretcher or in a reclining position.

In an action for personal injuries, upon a statement of the plaintiff's counsel, unsupported by proof and denied by the defendant, that the plaintiff is unable to come into court to testify except upon a stretcher or in a reclining position, it is within the discretion of the presiding judge to deny a motion of the plaintiff made before the trial, that the plaintiff be allowed to come into court to testify in a reclining position, supported on a stretcher or couch.

In an action for personal injuries, if the presiding judge finds that the plaintiff is unable to testify except in a reclining position and that she can testify in this way, whether it is the duty of the judge to permit her to be brought before the jury upon a stretcher instead of testifying by deposition, *quære*.

TORT for personal injuries from a rear end collision while the plaintiff was a passenger on a car of the defendant on July 4, 1903. Writ dated September 3, 1903.

At the trial in the Superior Court before *Maynard*, J., there was evidence of the defendant's negligence and of due care on the part of the plaintiff, and that the plaintiff was injured by the accident.

The jury returned a verdict for the plaintiff in the sum of $2,500; and the plaintiff deeming the damages insufficient alleged exceptions, relating to the denial of two motions made by the plaintiff at a hearing a week before the trial was begun, which are stated in the opinion of the court.

N. P. Avery & J. B. Carroll, for the plaintiff.

W. H. Brooks & W. Hamilton, for the defendant.

KNOWLTON, C. J. This is an action of tort, to recover damages for personal injuries. Before the trial the plaintiff's counsel stated to the court that the plaintiff was unable to come into court to testify, unless upon a stretcher or in a reclining posi-

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tion, and moved that the jury might take a view of the plaintiff at her home. The first question arises upon the plaintiff's exception to an order denying this motion.

Except in suits for the recovery of damages for the taking of land for a public use, the question whether a view should be taken, in any case, is a matter peculiarly within the discretion of the court. R. L. c. 176, § 35; c. 48, § 48. *Commonwealth* v. *Webster*, 5 Cush. 295, 298. *Commonwealth* v. *Chance*, 174 Mass. 245, 247. A motion that the jury take a view of the plaintiff in his home, in order to judge of the extent of his injuries, is very unusual, if not entirely unprecedented in this Commonwealth. There was no error of law in the denial of this motion, and the discretion of the court seems to have been wisely exercised.

The plaintiff presented at the same time, with the same statement, a motion to be allowed to come into court to testify in a reclining position, supported on a stretcher or couch. Both of these motions had been made and denied at a previous sitting of the court, and the case had then been continued. They were renewed and denied again about a week before the trial of the case. The plaintiff did not at any time appear in court, neither was her deposition taken, nor was any attempt made to take it. The statement of the plaintiff's attorneys that the plaintiff was unable to walk into court and testify standing or sitting in the usual way was denied by the attorneys of the defendant. At the trial of the case evidence was introduced by the plaintiff that she was seriously injured, and unable to sit up or to come into court and testify otherwise than upon a stretcher or in a reclining position. Evidence was introduced by the defendant that there was nothing the matter with her and that she was able to walk into court. Experts called by the plaintiff, and others called by the defendant, described in detail her physical appearance and condition.

There is no doubt that courts may make reasonable rules and orders for the conduct of business, the preservation of order and decorum, and the prevention of unseemly exhibitions. In such matters, much must be left to the discretion of the presiding justice. Whether, if the judge had found that the plaintiff was unable to testify except in a reclining position, and that she

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could testify in this way, it would have been his duty to permit her to be brought before the jury upon a stretcher rather than to testify by deposition, is a question which we need not decide in this case. It is enough for our decision to say that no evidence was introduced at the hearing, and that the statement made by the plaintiff's counsel was denied by the defendant's counsel. So far as the bill of exceptions shows, the judge may have believed that the plaintiff was well able to walk into court and to testify in the usual way. With a dispute between the parties as to whether the plaintiff's injuries were real or pretended, and with the opportunities for deception as to her condition that might be afforded by a reclining position upon a stretcher in the court room, the judge well might decide that the testimony should be presented in the usual way. In the absence of any finding of fact by the judge in favor of the plaintiff's representation, or of anything to show that the plaintiff was unable to walk into court, it is plain that the exception to the denial of this motion is not well founded.

Exceptions overruled.

HELEN L. COLE, administratrix, *vs.* IDA L. BATES (sole defendant by amendment).

Hampshire. September 20, 1904. — November 21, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Contract, Implied: common counts.

In this Commonwealth it is settled that money had and received will lie where the defendant has received money to which the plaintiff has an equitable right, and in this case it was assumed, without deciding it, that, where the plaintiff in equity can trace his money into the hands of the defendant, he can recover it from him in an action for money had and received as well as where the defendant received the money in the first instance.

If an action for money had and received can be maintained to recover money which in equity can be traced to the hands of the defendant, the recovery must be confined to cases where money is received for the plaintiff by some one standing toward him in a fiduciary capacity.

If the executor under the will of a deceased husband draws out a savings bank

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deposit belonging to the widow of his testator, claiming it as part of the estate, and pays it to the residuary legatee, the payment by the bank to the executor is wrongful, and the money paid is not the money of the widow, having been paid upon a demand adverse to her. Therefore neither the widow, nor the administrator of her estate, can follow the money in equity or maintain an action for money had and received for it against the residuary legatee under the will of the husband.

CONTRACT, by the administratrix of the estate of Elma M. Hancock, late of Huntington, for $317.69 alleged to have been had and received to the plaintiff's use, with interest from March 1, 1892, being the amount of a deposit alleged to have belonged to the plaintiff's intestate and to have been drawn from the Northampton Institution for Savings by Clarence E. Bates and paid by him to his wife, Ida L. Bates. Writ dated October 20, 1894.

In the Superior Court the case was tried before *Holmes*, J., without a jury. The following statement of the case is taken from the opinion of the court:

The judge found that the money deposited was the money of the plaintiff's intestate. The plaintiff's intestate was the second wife of Austin T. Hancock, and the defendant was his daughter by a first wife. Austin T. Hancock died on December 16, 1891, leaving, by his last will and testament, the residue of his property to his daughter, the defendant, subject to a life interest in his second wife. On January 6, 1892, the second wife died. On February 2, 1892, the defendant's husband was appointed administrator with the will annexed of the estate of the husband and father, and on February 6, 1892, he took possession of the bank book, drew out the money and deposited it in his own name as administrator of the estate of Austin T. Hancock, the husband and father. On February 9, 1892, the plaintiff was appointed administratrix of the estate of the second wife, and on the same day demanded the bank book of the defendant and of her husband, to which demand the husband answered in the defendant's presence that he had been advised that the book was the property of the estate of the husband and father, and refused to pay the money to the plaintiff. This action originally was brought against the husband as well as the wife. After the trial, the action was discontinued against the husband, on the motion of the plaintiff allowed by the judge.

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The judge found that the balance of the husband's account as administrator was at all times more than $317.69, and that the sum paid to the defendant as the residue of her father's estate by her husband as administrator with the will annexed of the father's estate amounted to $1,019.99, and was paid over as follows: $354.07 on or before January 17, 1893, and $665.92 on or before March 8, 1894. In addition he made this finding: The defendant "did not attend court, being ill, at the trial, and there is no positive evidence as to her knowledge of the facts about the book, but demand was made on both her and her husband, Clarence, for the book by the plaintiff, February 9, 1892, and there is no evidence that at the time of such demand any payments from the estate of Austin T. Hancock had been made to her"; also "She never received the identical money which was paid by the bank when the deposit was withdrawn." It appeared that on the front page or cover of the deposit book were these words: "Mrs. A. T. Hancock. Northampton Institution for Savings, No. 3609," and on the fifth page the following: "No. 3609, Northampton Institution for Savings in account with Mrs. A. T. Hancock. Order also Austin T. Hancock."

Upon these facts the judge ruled as matter of law that the plaintiff could not recover, and reported the case to this court.

J. B. O'Donnell, for the plaintiff.

A. J. Faryo, for the defendant.

LORING, J. [After the above statement of the case.] For the purposes of this case we assume that under the finding made by the judge the defendant is to be taken to have known that the amount paid to her as the residue of the estate was larger by the amount of $317.69 because that sum had been collected by the administrator and put into her father's estate.

It is settled in this Commonwealth that money had and received will lie where the defendant has received money to which the plaintiff has an equitable right. *Knowles* v. *Sullivan*, 182 Mass. 318. *Henchey* v. *Henchey*, 167 Mass. 77. *Derome* v. *Vose*, 140 Mass. 575. *Farrelly* v. *Ladd*, 10 Allen, 127. *Peabody* v. *Tarbell*, 2 Cush. 226. And we assume for the purpose of this discussion (without making a decision to that effect) that where the plaintiff can trace his money in equity into the hands of the defendant he may recover it from him in an action of money had

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and received as well as when the money was received in the first instance by the defendant.

Further, in the case at bar the plaintiff has traced her money into the defendant's hands, if the money in the hands of the administrator was her money within the rule in equity as to tracing money. She has shown that it went into the bank account of the administrator and that there was always more to the credit of that account than the sum in question. In such a case the sums drawn are taken to have been rightly drawn and are applied against deposits made from the proper funds of the depositor. *In re Hallett's estate*, 13 Ch. D. 696. *Hancock* v. *Smith*, 41 Ch. D. 456. See also *Knight* v. *Fisher*, 58 Fed. Rep. 991, cited by the plaintiff. Moreover in the case at bar it must be taken that the whole amount of the account was finally paid to the defendant.

But we are of opinion that the money received by the administrator with the will annexed of the estate of the husband and father was not the plaintiff's money in his hands within the rule that allows her to follow her money in equity. That rule is confined to money received for the plaintiff by some one standing toward her in a fiduciary capacity. *In re Hallett's estate*, 13 Ch. D. 696.

In the case at bar the only ground on which the defendant's husband (as administrator with the will annexed of his wife's father) could claim the deposit was this: The money deposited was the money of the husband although deposited in the name of the wife; it had been made payable to the husband in fulfilment of the obligation ensuing from these facts; this order for payment had been accepted by the savings bank by changing the terms of the deposit; this gave a right to the husband to collect the deposit, and this right survived to his administrator with the will annexed. On the other hand, if the administrator claimed to be paid on the ground that the money deposited was the money of the wife, the order for payment to the husband was an order for payment to him for her benefit and was an order personal to the husband which did not authorize payment to his administrator. In either event the payment by the bank was not a valid payment. The money received by the administrator was not received as the money of the wife but under a claim

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adverse to her and to the administrator of her estate. The money in the defendant's hands was not the plaintiff's money, and she could not follow it in equity.

It cannot be said that in collecting the $317.69 and ultimately paying it over to her, the administrator was an agent and the defendant the principal, although she was the only person interested in the estate if it turned out to be solvent, and although she was present when the demand for the savings bank book was made both upon her and her husband in her presence. An administrator acts for the benefit of whomsoever turns out to be the person beneficially entitled, and the defendant's husband in the case at bar must be taken so to have acted here in claiming what he was advised was a part of the estate.

None of the cases particularly relied on by the plaintiff supports her contention. In *Bearce* v. *Fahrnow*, 109 Mich. 315, the defendant received the money from the agent of the plaintiff with notice that it was his money. The decision in *Northrop* v. *Graves*, 19 Conn. 548, went on the ground that the payment was in legal contemplation a payment to the husband. In *Barnes* v. *Johnson*, 84 Ill. 95, the money due to the plaintiff was collected by the defendant, and in *Tevis* v. *Brown*, 3 J. J. Marsh. 175, there was a subsequent agreement that the money tortiously taken should be treated as a loan.

For cases somewhat like the case at bar, see *Moore* v. *Moore*, 127 Mass. 22, and *Rand* v. *Smallidge*, 130 Mass. 337.

The entry must be

Judgment for the defendant.

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ADAM BORUSZWESKI & another *vs.* MIDDLESEX MUTUAL ASSURANCE COMPANY.

Worcester. October 4, 1904. — November 21, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Insurance, Fire, Sworn statement of loss. *Evidence,* Extrinsic affecting writings.

In an action on a fire insurance policy in the Massachusetts standard form, it appeared, that the defendant's adjuster went to the town where the fire had occurred, saw the broker who procured the insurance, and asked for information about the loss. He refused to look at the place where the fire occurred or to go to the broker's office, where he was told there was a "proof of loss," and left the town, saying to the broker on leaving that he would see him or communicate with him again in a short time. *Held*, that there was no evidence that the defendant had waived the requirement of a sworn statement of loss.

Evidence of a custom is not admissible to change the plain terms of a contract in writing.

In an action on a fire insurance policy in the Massachusetts standard form, where the defence is a failure of the plaintiff to render to the company a sworn statement of loss as required by the policy, the plaintiff cannot vary the contract by proving a custom under which a failure of the company, upon notice that a fire has occurred, to send to the insured a blank form for the sworn statement of loss, or to send an adjuster to make an adjustment of the loss on the ground carrying with him such a blank form, is a waiver of the requirement in the policy of a sworn statement of loss, under which custom the company would be liable for the amount of the policy, without regard to the damage done by the fire, in sixty days after a mere informal notice that a fire has occurred instead of being liable for the amount adjusted according to the terms of the policy only in sixty days after the sworn statement has been rendered to the company.

LORING, J. This is an action on a policy insuring the plaintiffs against loss by fire upon a dwelling house and barn and certain personal property contained therein. The defence is that the plaintiffs never have rendered the sworn statement in writing called for by the policy, which is in the form prescribed by R. L. c. 118, § 60. The plaintiffs' contention is that this has been waived by the defendant, and that they proved a custom making it unnecessary. The case is here on a report by the presiding judge, who directed the jury to return a verdict for the defendant.

The facts relied on by the plaintiffs as constituting a waiver are that the defendant on receiving an informal notice of the fire sent an adjuster to Webster, where the property insured was

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situated. The adjuster notified the broker who placed the insurance that he was coming. The broker met him at the station and had a talk with him there about the loss. The broker then told him that he had just driven the adjuster of another company to the locus, and that the other adjuster had just left. The defendant adjuster asked why he had not waited for him. The broker then asked him to go to his office, where he said he had a "proof of loss," but the adjuster refused; he also refused to visit the place of the fire, although the broker offered to "carry him out." He said that he did not want to attend to it that day, as he was anxious to go to Hartford, but told the broker that he would see him or communicate with him in a short time. He left on a train a few minutes later. Nothing was done on the part of either party until nearly five months later, when the plaintiffs retained counsel. In answer to a letter from counsel not put in evidence the president of the defendant company wrote, stating that their adjuster learned facts when he visited the scene immediately after the fire, indicating that the fire was not an honest one; that the fire marshal had written to the same effect after making an investigation; and insisting that the plain provisions of the policy had not been complied with since the fire. The letter ended with a statement that the company supposed the plaintiffs had failed to comply with the essential conditions through consciousness of wrong doing.

The question is whether there is anything in this which amounts to a waiver of performance of the clause of the policy requiring the insured, in case of a fire, to render forthwith a sworn statement in writing giving (1) the value of the property insured, (2) the interest of the insured in that property, (3) all other insurance on it, (4) the purposes for which and the person by whom the buildings in question were used, and (5) the time and manner in which the fire originated so far as known. By the terms of the policy the insurance money due is payable sixty days after this statement is rendered.

The performance of this clause is a condition precedent to the defendant's liability. *Cook* v. *North British & Mercantile Ins. Co.* 183 Mass. 50. *Parker* v. *Middlesex Mutual Assur. Co.* 179 Mass. 528. See also *Audette* v. *L'Union St. Joseph*, 178 Mass. 113;

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Smith & Dove Manuf. Co. v. *Travellers' Ins. Co.* 171 Mass. 357; *Johnson* v. *Phœnix Ins. Co.* 112 Mass. 49; *Smith* v. *Haverhill Ins. Co.* 1 Allen, 297; *Shawmut Sugar Refining Co.* v. *People's Ins. Co.* 12 Gray, 535.

The rendering of this statement is the first step called for by the policy, to be taken by the insured in case of a loss. On such a sworn statement being made and delivered to the company, it is its duty to decide whether it will pay the loss, and to determine the amount due. If the amount of damage done is not agreed upon, it is fixed by arbitration. In either event the amount due becomes payable sixty days after the sworn statement is rendered to the company.

The nearest case in this Commonwealth is the case of *Searle* v. *Dwelling House Ins. Co.* 152 Mass. 263. In that case, on receiving informal notice that there had been a fire, the company sent an adjuster to agree on the amount of the loss, understanding that he carried with him blanks on which a proof of loss was to be made in accordance with the adjustment reached. The agent agreed with the insured upon the amount of the loss, item by item, and that was written down. He then told the insured that he would write it out on a proper blank and send it to her to be signed and sworn to. The insured heard nothing from the adjuster or the company for some three or four weeks. She then went to the local agent who issued the policy, and he wrote to the company in her behalf. In answer the company refused to pay the loss on another ground. This was held to justify a finding that the presentation of the sworn statement had been waived. In that case the fire took place on October 11, 1885. On May 27, 1886, a sworn statement was rendered. The court ruled that this sworn statement was rendered too late to be a compliance with the policy, and left the case to the jury on the question of waiver. The ground on which the case goes is that the action of the company was inconsistent with an intention to insist on a sworn statement being rendered. For another case where the rendering of a sworn statement was waived altogether, see *Eastern Railroad* v. *Relief Ins. Co.* 105 Mass. 570.

But in the case at bar there was nothing in what the defendant did inconsistent with an intention to insist on a full compliance with this clause of the policy. Until a sworn statement

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containing the information called for is rendered, the company is under no duty to take up the question of adjustment of the loss. Before proceeding with the adjustment of a loss, an insurance company, under the Massachusetts standard form of policy, has the right to have the insured commit himself, in writing and under oath, upon the facts to be set forth in the sworn statement, namely, (1) the property covered by the policy in existence at the time of the fire and the value of it; (2) the plaintiff's interest in the insurance; (3) the insurance on the property; (4) the purposes for which the buildings in question were used; and (5) the history of the fire so far as known. But the company is not bound to abstain from all investigation until this condition precedent is performed. In the case at bar the defendant's adjuster went to the town in question and saw the broker who placed the insurance, and asked for information about the loss; he refused to look at the place where the fire was, refused to go to the broker's office, where, he was told, there was a "proof of loss," and left. There was nothing in this inconsistent with a determination to insist on the provision of the policy here in question being performed. The only other thing was his statement to the broker on leaving that he would see him or communicate with him again in a short time. The most that can be claimed for that is that it excused the plaintiffs from rendering the sworn statement until a reasonable time had elapsed, if they or their agents relied on this remark of the adjuster in not rendering the statement forthwith, and there is no evidence that they did rely on it. This remark is not inconsistent with a determination on the part of the insurance company to insist upon the sworn statement being made out, signed, sworn to and delivered to it, and the plaintiffs could not have been misled by it. For that reason the jury were not warranted in finding that the performance of that condition had been waived.

None of the cases cited by the plaintiffs in which it has been held that there has been a waiver of preliminary proofs of loss goes as far as we are asked to go in this case. See *Harrison* v. *German-American Ins. Co.* 67 Fed. Rep. 577; *Tillis* v. *Liverpool & London & Globe Ins. Co.* 33 Ins. L. J. 289; *Graves* v. *Merchants & Bankers Ins. Co.* 82 Iowa, 637; *Brown* v. *State Ins. Co.* 74 Iowa,

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428; *Hartford Ins. Co.* v. *Keating*, 86 Md. 130. Of the other cases principally relied on by the plaintiffs, it was held in *Weidert* v. *State Ins. Co.* 19 Ore. 261, that there was no waiver; and in *Gould* v. *Dwelling-House Ins. Co.* 134 Penn. St. 570, and *Perry* v. *Dwelling-House Ins. Co.* 67 N. H. 291, there was an attempt to comply with the provision within the time specified.

The argument of the plaintiffs that the letter of the president was in itself a waiver makes it necessary to state that it was not. It insists that the plain provisions of the policy have not been complied with since the fire.

This brings us to the custom testified to on the part of the plaintiffs, which was in substance as follows: In case of a loss the insured notifies the broker of the fire and he sends notice to the company. The company then either sends a blank form of a "proof of loss" or an adjuster to make an adjustment of the loss on the ground, who carries such a blank with him; and the failure of the company to send a blank or an adjuster is a waiver of the condition of the policy "that there be a proof of loss in writing," and the company settles within sixty days for the amount of the policy.

It is settled that a custom is bad which contradicts a contract the terms of which are plain. A custom is admissible to explain what is doubtful, but when the terms of the contract are plain the right of one party to it cannot be taken away by custom. The last case on the point is *Menage* v. *Rosenthal*, 175 Mass. 358, where some of the cases are collected. To these should be added *Benson* v. *Gray*, 154 Mass. 391, (where also a collection is made of the earlier cases,) *Macomber* v. *Howard Ins. Co.* 7 Gray, 257, and *Stone* v. *Howard Ins. Co.* 153 Mass. 475.

By the terms of the contract no notice is required to be sent by the insured until the sworn statement is made out and rendered, and the defendant is under no obligation to do anything about the matter until the plaintiff has committed himself in writing and under oath on the matters therein to be set forth. The amount due is not payable until sixty days after this has been rendered. A custom which substitutes a mere notice that a fire has occurred for this statement in writing on the five points specified, signed and sworn to by the insured and rendered by him to the company forthwith, and which makes the

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company liable for the amount of the policy without regard to the damage done by the fire, in sixty days after informal notice of the fire is given, is bad.

Some confusion seems to have arisen from calling the sworn statement called for by the Massachusetts standard form a "proof of loss." This is probably a survival of the practice which had obtained under the policies in use before the standard form was adopted, (Sts. 1873, c. 331, and 1881, c. 166,) which usually, if not universally, called for a sworn statement of the amount of loss caused to the property insured, by the fire, *inter alia*. But the amount of the loss is not called for in the sworn statement specified in the Massachusetts standard form.

Judgment on the verdict.

A. P. Rugg, (*J. R. Thayer & H. H. Thayer* with him,) for the plaintiffs.

F. W. Brown, for the defendant.

WILLIAM HARRINGTON *vs.* CITY OF WORCESTER.

Worcester. October 5, 1904. — November 21, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Worcester. Municipal Corporations.

Before the enactment of St. 1886, c. 331, it was not the duty of the city of Worcester to establish an independent system of sewage purification, which would require the taking of lands and the expenditure of large sums of money, necessary to purify the sewage discharged into the Blackstone River through Mill Brook under authority of St. 1867, c. 106, and, therefore, in an action against that city for injury to the plaintiff's land and mill pond, the fact that sewage in the water of Blackstone River caused the plaintiff's damage, coupled with the fact that the city made no attempt to purify its sewage before discharging it into the river, is not evidence of negligence on the part of the city before the enactment of St. 1886, c. 331.

St. 1886, c. 331, establishing a system of sewage disposal for the city of Worcester, imposes a public duty on that city in the interest of the general public, looking particularly to the protection of the health of the people living near the Blackstone River, and does not give that city privileges for its own benefit as did St. 1867, c. 106. Therefore the city is not liable to one whose land and mill pond are injured by a negligent failure of the city properly to perform the duty imposed upon it by the first named statute.

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KNOWLTON, C. J. .This case is before us on a demurrer to the plaintiff's declaration, charging the defendant with carelessly and negligently constructing its sewers and drains, and carelessly and negligently and improperly failing to purify the waters discharging through the sewers and drains, before discharging them on the plaintiff's premises, so that the water flowing through the plaintiff's mill pond has become corrupted, impure and filthy, and sewage has been placed upon the plaintiff's premises and in his mill pond, and other damages have been caused to him and to his property. Under an order of the Superior Court, upon the defendant's motion, specifications were filed setting forth particularly the matters relied on, and the defendant filed a second demurrer to the declaration and specifications. At the hearing upon the declaration, specifications and demurrers, it was agreed by the plaintiff, as appears by the report of the presiding judge, that the declaration and specifications be modified by allegations as follows: "That when chapter 331, Laws of 1886, was enacted, it was necessary for the city of Worcester to adopt a system of sewage purification independent of the construction of its sewers, and to take tracts of land therefor, in order to prevent the pollution of the Blackstone River arising from the appropriation and use of Mill Brook as a sewer, in the manner authorized by chapter 106, Laws of 1867; that there has been no negligence on the part of the city in the actual construction or management of its sewers and no negligence on the part of the city unless negligence be inferable from the fact that prior to 1886 the city made no attempt to purify its sewage before discharging it into the Blackstone River through said Mill Brook; and that since 1886, it has failed to adopt a system of purification adequate in size and proper in design to accomplish the purification of its sewage, although such system might have been adopted and constructed, but would have involved the expenditure of larger sums of money and taking larger tracts of land. In 1886 and thereafter, the city of Worcester, acting under chapter 331, Laws of 1886, established purification works which necessitated its taking large tracts of land and making large expenditures of money, and has expended for land and constructions, over $1,500,000, and annually, sums varying from $14,000 to $53,000 for maintenance. Except as modified

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hereby, all allegations of the declaration and specifications stand." The judge overruled the demurrers, the defendant appealed, and the judge reported to this court the questions of law raised by the appeal with a stipulation that if the demurrer should be sustained judgment should be entered for the defendant. This agreement does not appear of record, except in the report, and we infer that it was made orally at the hearing, and treated as a modification of the plaintiff's pleadings. It would have been more regular to have put the agreement in writing, and to have filed it as an amendment of the declaration or specifications; but it has been embodied in the written report of the judge which is a part of the record, and adopted in that form by the parties. We therefore will treat it as an amendment of the declaration.

The effect of the declaration and specifications, so modified, is, as we interpret them, to present an averment that the plaintiff suffered damage in his property from the pollution of the stream, and the discharge of sewage through it upon his land, but that, prior to the action of the city under the St. 1886, c. 331, there has been no negligence on the part of the city, either in the construction or management of its sewers or otherwise, unless negligence is inferable from the fact that, prior to 1886, the city made no attempt to purify its sewage before discharging it into the Blackstone River through Mill Brook.

The first question is whether negligence is inferable from the fact that sewage in the water caused the plaintiff damage, coupled with the fact that the city made no attempt to purify its sewage before discharging it into the river.

The law applicable to the use of Mill Brook by the city of Worcester, under the statutes, has often been considered by this court. *Merrifield* v. *Worcester*, 110 Mass. 216. *Butler* v. *Worcester*, 112 Mass. 541. *Washburn & Moen Manuf. Co.* v. *Worcester*, 116 Mass. 458. *Workman* v. *Worcester*, 118 Mass. 168. *Woodward* v. *Worcester*, 121 Mass. 245. *Morse* v. *Worcester*, 139 Mass. 389. *Washburn & Moen Manuf. Co.* v. *Worcester*, 153 Mass. 494. The St. 1867, c. 106, authorized the city of Worcester to take and use Mill Brook for the purpose of receiving sewage and discharging it into the river below, and the case last cited holds that some contamination of the water in the river must have been

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contemplated by the Legislature as necessarily incidental to this use, and that damages for such contamination could be recovered by riparian proprietors under the statute. On the other hand, in *Morse* v. *Worcester*, 139 Mass. 389, it was decided that the city was bound to use due care in the construction and management of its sewers, so as not to cause any unnecessarily injurious consequences to others, and that, "if it is practicable to use any methods of constructing the sewer, and, as a part of the construction, of purifying the sewage at its mouth, at an expense which is reasonable, . . . it is the duty of the city to adopt such methods." But the court went on to say that it was not the duty, nor within the power, of the city to establish an independent system of sewage purification which would require the taking of lands and the expenditure of large sums of money for the construction and operation of such a system. Such a system was authorized and required by the St. 1886, c. 331, and it is agreed that, for the proper purification of the sewage, such a system was necessary. For the failure to establish such a system prior to the enactment of the statute, the city is not liable. Following the law as it is stated in the two cases last cited, the mere fact that the water at the plaintiff's pond was somewhat polluted, is not proof of negligence on the part of the defendant; for the existence of some pollution there, as necessarily incident to the use of the brook in the manner authorized, was contemplated by the Legislature. For the damage caused by such necessary pollution, the plaintiff was entitled to recover, and presumably did recover damages under the original statute. If, as a part of its system of sewerage, the city could purify the sewage by any reasonable incidental construction and by careful management, without the establishment of an independent plant for purification, involving the taking of land and the exercise of other powers not given by the statute, it was its duty to do it. The precise question is whether it can be inferred from the facts before the court that there could be such purification which would have materially diminished the plaintiff's damages. We do not see how such an inference can be drawn from the facts averred, as limited by the agreement. It is possible that some effectual means of purification could have been provided in connection with and as a part of the construction and main-

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tenance of the sewer; but we think it quite as probable that it could not have been done without the exercise of powers which the city then did not possess. There is nothing stronger than conjecture, if there is even that, in favor of the proposition to be proved. We are therefore of opinion that, under the agreement, there was no actionable negligence on the part of the city, before the enactment of the St. 1886, c. 331.

It is averred that, under this statute, the city has failed to adopt a system of purification adequate in size and proper in design to accomplish the purification. The question on this part of the case is whether such negligence is actionable. This depends upon the construction of the statute. If this is an act putting upon the city of Worcester, as an agency of the government, the performance of a governmental duty for the benefit of the general public in the neighborhood of the Blackstone River, there is no liability in damages for the failure properly to perform the duty. This principle of law is established in this Commonwealth by many decisions, and it is recognized quite generally elsewhere. *Hill* v. *Boston*, 122 Mass. 344, and cases cited. *Bigelow* v. *Randolph*, 14 Gray, 541. *Benton* v. *Boston City Hospital*, 140 Mass. 13. *Tindley* v. *Salem*, 137 Mass. 171. *Pettingell* v. *Chelsea*, 161 Mass. 368. *Eastman* v. *Meredith*, 36 N. H. 284. *Maxmilian* v. *Mayor of New York*, 62 N. Y. 160. If, on the other hand, this should be treated as merely an enabling act to authorize the city of Worcester to perform duties beyond those which it was authorized to perform under the St. of 1867, c. 106, in order the better to protect individual owners upon the stream in the enjoyment of their original rights of property which had not been taken away under the earlier statute, the city is liable for this negligence, as it was liable under the chapter just mentioned for negligence in the construction and management of the sewer in Mill Brook. The considerations in favor of each of these different views of the law are of nearly equal weight; but, on the whole, we think it a better interpretation of the language of the Legislature to hold that this is a measure in the interest of the general public, looking particularly to the protection of the health of the people living near the Blackstone River, and that the duty to make this provision was imposed as other public duties which rest upon cities and towns

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are imposed, like the duty to provide for the education of children, or the duty to establish and maintain the ordinary institutions of the government. It does not purport to give the city privileges which it asks for its own benefit, but it is mandatory. It requires the removal of the sewage, not so completely as to make the water pure for all kinds of manufacturing purposes, but only to such a degree that it shall not "create a nuisance or endanger the public health." It does not direct that this shall be done at once, but only that it shall be done within four years after the passage of the act. There is a special provision for the enforcement of the statute by injunction or other equitable process, and this does not seem to be for the benefit of riparian proprietors or other property owners as such, but for the benefit of the general public. Action of this kind can be taken only on complaint of the selectmen of a town on the Blackstone River.

The last section specially recognizes in another way the fact that this is a public matter, in which the city of Worcester acts, in part at least, as an agency of the government; for there is a provision that the Commonwealth may, if it deems it equitable so to do, distribute a part or the whole of the expenses of this service among all the cities and towns of the State. Primarily and chiefly, it seems to be a measure in the interest of the public health, and these provisions, enacted with a knowledge of the rule of law that for the non-performance of public duties there is no liability in an action for negligence, indicate a purpose to leave the city without liability to individual property owners under this statute. It follows that this action cannot be maintained, and that the public must look for the protection of their interests to proceedings in equity instituted on the complaint of a board of selectmen.

Judgment for the defendant.

A. P. Rugg, (*J. F. Humes* with him,) for the defendant.

T. H. Gage, Jr., for the plaintiff.

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LUCY A. TURNER *vs.* CHARLES P. PAGE.
HENRY A. TURNER *vs.* SAME.

Worcester. October 5, 1904. — November 21, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence, In driving, Proximate cause.

A driver of horses attached to a tip cart, who leaves them standing near a railroad crossing where a switching engine is shifting back and forth while he goes back to pick up a part of his load which has fallen from the cart, may be found to be negligent if the horses run away and cause injury, although the horses never had run away before and many times had been left unhitched and had been much about railroads and were accustomed to the sights and sounds about trains, and although the driver had no knowledge of any tendency on the part of the horses to run away, and did what it was customary to do under similar circumstances.

One who negligently allows a pair of horses to run away can be found to be none the less liable for injury done by them, or if he is a servant his master to be none the less liable, because before doing the injury the horses swerved from their course when one of them was hit on the head with a rake by a person trying to stop them. Such an intervening act can be found to be a natural and probable consequence of letting the horses run away.

TWO ACTIONS OF TORT, one by a married woman for personal injuries, and the other by her husband for loss of consortium and expenses, and for injuries to the buggy in which the plaintiff in the first case was sitting when the accident occurred, alleged to have been caused by the negligence of the defendant's servant. Writs dated May 25, 1903.

At the trial in the Superior Court before *Gaskill*, J., it appeared, that the plaintiff in the second case had gone into a bank on Central Street in Gardner, leaving his wife sitting in the buggy, when a pair of horses, attached to a tip cart belonging to the defendant and without a driver, ran into the buggy, the pole of the tip cart breaking the back of the buggy and throwing out the plaintiff in the first case; that the driver of the tip cart had left his horses standing eight or ten feet from a railroad track while he went back about six or eight feet to pick up a part of his load of stove wood which had dropped from the cart; that there was a switching engine shifting back and forth over the

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crossing, puffing and blowing; that the horses suddenly started and ran, the driver running after them in vain; that one Buffum tried to stop the horses by standing in front of them and holding up a wooden rake which he had in his hand; that when the horses came upon him he jumped aside hitting or touching the head of one of them with the rake; and that the horses somewhat changed their course and ran into the buggy standing by the sidewalk as above described.

At the close of the evidence the defendant asked the judge to make the following rulings:

"1. Upon all the evidence, the plaintiff is not entitled to recover.

"2. There is no sufficient evidence of negligence on the part of the defendant.

"3. There is no sufficient evidence of negligence on the part of the driver of the horses which ran away to warrant a recovery.

"4. If the horses which ran into the plaintiff would not have so collided and the injuries would not have occurred, except for the intervening attempt of Buffum to stop the horses, coupled with the blow with the rake over the head of the nigh horse, then the plaintiff cannot recover.

"5. If the horses which ran had always before the accident been safe, docile and gentle horses, and they had never run away before, and the driver had no knowledge of any tendency on their part to run away, and they had many times before been left without being hitched, and they had been much about railroads and were familiar with the sights and sounds about railroad trains, and the driver of the horses did what it was customary to do under similar circumstances, then the plaintiff cannot recover."

The judge refused to rule as requested and gave other instructions. The jury returned a verdict for the plaintiff in each case, in the first case in the sum of $100, and in the second case in the sum of $205. The defendant alleged exceptions.

A. P. Rugg, (*H. H. Thayer* with him,) for the defendant.

G. R. Warfield, for the plaintiffs.

LORING, J. 1. The difficulty with the defendant's argument in support of his exception to the refusal to give the fifth ruling

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asked for and to so much of the charge as is inconsistent with it is that what is complained of in the argument is not the refusal of what was asked for in the ruling. The complaint made by the defendant in his argument is that the judge did not tell the jury to consider the previous habits of the horses in passing on the question of the driver's negligence. What the defendant asked for in this ruling was that if the jury believed the testimony as to their previous habits the plaintiff could not recover.

2. The difficulty with his argument in support of his exception to the refusal to give the fourth ruling asked for lies in the assumption that the persons who attempt to stop runaway horses will in fact act as the typical prudent man would act. We are of opinion on the contrary that among the natural and probable consequences of negligently letting a pair of horses run away it is competent to find that they will swerve to one side or the other on account of the acts of persons who try to stop them in a way which would not have been adopted by a prudent man, including waving a rake and hitting one of the horses over the head with it. The case comes within *Lane* v. *Atlantic Works*, 111 Mass. 136; *Koplan* v. *Boston Gas Light Co.* 177 Mass. 15; *Boston Woven Hose & Rubber Co.* v. *Kendall*, 178 Mass. 232; *Murray* v. *Boston Ice Co.* 180 Mass. 165; see also *Clifford* v. *Atlantic Cotton Mills*, 146 Mass. 47, 48 (where the earlier cases are collected); and does not come within *Stone* v. *Boston & Albany Railroad*, 171 Mass. 536; *Glynn* v. *Central Railroad*, 175 Mass. 510; *Glassey* v. *Worcester Consolidated Street Railway*, 185 Mass. 315. See also *Clifford* v. *Atlantic Cotton Mills*, 146 Mass. 47, 49.

Exceptions overruled.

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SUPPLEMENT.

Opinion of the Justices to the Governor and Council.

St. 1904, c. 458, attempting to give bounties to those veterans of the Civil War who did not receive bounties at the time of their enlistment, is unconstitutional, as requiring the expenditure of money from the public treasury for a private use.

The justices of this court in giving opinions upon important questions of law to a branch of the Legislature or to the Governor and Council in performance of the duty imposed upon them by the Constitution of the Commonwealth, c. 3, art. 2, give their opinions only so far as required to aid in the performance of official duties in regard to a matter then pending.

The following communication from the Governor and Council was transmitted to the Justices of the Supreme Judicial Court on July 22, 1904:

At a meeting of the Governor and the Council held on the twentieth day of July, 1904, it was ordered that the opinion of the Justices of the Supreme Judicial Court be requested upon the following important questions of law:

1. Whether the act of the Legislature of Massachusetts, entitled "An Act to provide for the payment of bounties to certain veterans of the civil war," being chapter 458 of the Acts of the year 1904, has the force of a law, it appearing by the journal of the House of Representatives, which is the branch of the Legislature in which said act originated, that less than two thirds of the members of said House of Representatives agreed to pass the same notwithstanding the objections of the Governor thereto duly communicated to said house in writing, and it appearing further by said journal that two thirds of the members of said house who were present and voting did agree to pass the act over the executive veto.

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2. Whether the phrase in Part the Second, Chapter 1, Section 1, Article II of the Constitution of Massachusetts, "two thirds of the said Senate or House of Representatives" means two thirds of the members elected, two thirds of the members living, two thirds of the members present and voting, or two thirds of a quorum, though more than a quorum are present and voting.

3. Whether, if in the opinion of the justices said bill was duly enacted, it is a constitutional exercise of legislative power.

On September 21, 1904, the Justices returned the following answer:

To His Excellency the Governor and to the Honorable Council:

We, the Justices of the Supreme Judicial Court, have considered the questions upon which our opinion was required by the order, a copy of which is hereto annexed, and we respectfully answer as follows.

The three questions present in different forms, in reference to different conditions, the single general question, Is chapter 458 of the Acts of the year 1904 a valid law under the Constitution of the Commonwealth? The third question is in these words: "Whether, if in the opinion of the justices said bill was duly enacted, it is a constitutional exercise of legislative power." As this relates to the substantive provisions of the statute, we will consider it first.

The statute directs payment "out of the treasury of the Commonwealth" of "the sum of one hundred and twenty-five dollars to every veteran of the civil war living at the date of the passage of this act, not being a conscript or a substitute, who served in the army or navy of the United States to the credit of Massachusetts during the civil war, and who was honorably discharged from such service: provided, that he has not received a bounty from any city or town or from the Commonwealth for such service; and provided, that he makes application for the said bounty prior to the first day of November in the year nineteen hundred and six." Section 6 authorizes an issue of bonds of the Commonwealth to provide for the payments to be made under the act, and authorizes an appropriation of money to pay the bonds, out of the sums that shall be received from the United

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States government for expenses incurred by the Commonwealth in connection with the Civil War. Under the St. of 1903, c. 471, these sums are to be paid into the treasury of the Commonwealth for the reduction of the public debt, and the effect of the statute before us is to take from the treasury, for the payment of these bounties, money which ultimately can be replaced only by taxation. We are therefore brought to the question whether it is in the power of the Legislature to tax the people of the Commonwealth to provide money for this purpose.

It is a familiar rule of law that, under the Constitution of the Commonwealth, money can be raised by taxation only for public purposes. This rule has been stated and explained in many judicial opinions. See *Lowell* v. *Boston*, 111 Mass. 454, and cases hereinafter cited. Whether the use of money under the provisions of a particular statute is for a public purpose, or merely for the benefit of individuals, is sometimes a question difficult to answer, although usually it is easy of determination. In the present case, if the only object of the statute is to give gratuities to individuals of a certain class, without any benefit to the general public, the statute is unconstitutional.

In *Mead* v. *Acton*, 139 Mass. 341, a case which arose in regular judicial proceedings and was argued by counsel, questions were decided by our predecessors which are identical in principle with those now before us. The St. of 1882, c. 93, purported to authorize the town of Acton to raise money by taxation to pay a bounty of one hundred and twenty-five dollars each to certain soldiers who had re-enlisted in the Twenty-sixth Regiment of Massachusetts Volunteers, to the credit of the town, and who never had received any bounty for such re-enlistment. The court held the statute unconstitutional, saying in the opinion, among other things, "In the case at bar it seems to us clear that the object for which the town of Acton has raised this money is private, and not public. The town has made no promise to these soldiers, and is not under any obligation to pay them any bounties. The purpose is not to repay any sums advanced them as an inducement to enlist. . . . The war has been over for many years, and the payment of these bounties cannot encourage enlistments, or in any way affect the public service, or promote the public welfare. The direct

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primary object is to benefit individuals, and not the public." This case was approved and reaffirmed by the court in *Kingman* v. *Brockton*, 153 Mass. 255. In the *Opinion of the Justices*, 175 Mass. 599, although a question was raised about some of the language of the court in *Mead* v. *Acton*, the case was assumed to have been correctly decided. In the opinion last mentioned this language was used: "The ground of decision in *Mead* v. *Acton*, 139 Mass. 341, which certainly went very far, was not a distinction between the direct and indirect action of the Legislature, but was that, because the war had been over so long, it was manifest that the public welfare could not be promoted by the payment of the proposed bounties, and therefore a statute attempting to authorize such a payment by any one attempted to divert public funds to private uses and was void. Possibly other reasons could have been invoked." It is plain that there is no difference in principle between a statute purporting to authorize a town to raise money by taxation to pay bounties to soldiers who served on its quota in the civil war, and a statute purporting to authorize the State to perform an act of the same kind. We cannot sustain the present statute without departing from the law of the decision in *Mead* v. *Acton*, and disregarding a precedent which hitherto has been held to be correct.

It is to be noted that the present statute, like the statute before the court in the former case, deals only with bounties. It is called "An Act to provide for the payment of bounties to certain veterans of the civil war." Under the language of the first section the soldier must make "application for the said bounty." The kind of bounty is plainly indicated. It is such as many soldiers received from cities or towns, or from the Commonwealth, for such service; for the act provides that soldiers who received a bounty, either from a city or town or from the Commonwealth, shall receive nothing under this act. The manifest object of the statute is to give to soldiers, forty years after their enlistment, bounties similar to those that others had at the time of their enlistment.

Many statutes were enacted in Massachusetts in 1863, 1864 and 1865, in regard to the payment of bounties to volunteers. The ground on which they were held constitutional was not that

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cities or towns or the State had a right to make gifts to volunteers, merely as gratuities, or as tokens of appreciation of their patriotism in volunteering to enter the military service of the United States. Bounties were not given in such a way or for such a purpose. They were given to help cities and towns to fill their quotas from time to time, under the calls of the President, "in the necessary defence and support of the government of the said Commonwealth, and the protection and preservation of the subjects thereof." This was the public purpose for which the money was raised, and which long ago was entirely accomplished. The reasons for the justification of the legislation as constitutional are stated in *Lowell* v. *Oliver*, 8 Allen, 247, 256, and in *Freeland* v. *Hastings*, 10 Allen, 570, 586–589. These grounds of justification are wholly inapplicable to a statute giving gratuitous bounties many years after the end of the war.

Nor is the present statute like the early statutes of this and other States in favor of soldiers of the Revolutionary War, referred to in the opinion in 175 Mass. 599. Those soldiers were in the military service of the several States, which were then our only recognized governments, while the soldiers referred to in this statute enlisted and were mustered into the military service of the United States. When military pensions are granted, it is fitting that they should be given by the government in whose army the soldiers served.

But in this opinion we need not consider the subject of pensions to soldiers, for the statute does not purport to grant pensions or rewards for meritorious service, or money for the relief of present necessities. It purports to give bounties now only to those who did not receive them at the time of enlistment, which, if given then, would have been given as inducements to enlist in the service of the United States. Under the provisions of this statute, those who enlisted without a bounty, under other influences or upon other inducements, would receive now as a gratuity this sum of money representing an additional inducement. The object of the act, as disclosed by its provisions, is not to give rewards in recognition of valuable services, and thus to promote loyalty and patriotism, but to equalize bounties given to induce enlistments in a particular military service many years ago.

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Following the law as stated in *Mead* v. *Acton*, we are of opinion that the proposed expenditure of money is for a use which is not public, but private, and that therefore the statute is not in conformity with the Constitution of the Commonwealth.

From our understanding of the object of the questions submitted to us, we infer that our negative answer to the third question, already given, will satisfy all requirements of the Governor and Council for information as to the law that should govern them in their official action in reference to this statute. We are always reluctant to give opinions upon legal questions of grave importance without the aid of arguments of counsel. It is our duty to do this when required under c. 3, art. 2 of the Constitution, but only so far as our opinion is desired as an aid in the performance of official duties in regard to a matter then pending. In the belief that this opinion meets all requirements of the Governor and Council upon the present occasion, we ask to be excused from answering the first two questions.

Marcus P. Knowlton.
James M. Morton.
John Lathrop.
James M. Barker.
John W. Hammond.
William Caleb Loring.
Henry K. Braley.

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2. The rule of the United States District Court for the District of Massachusetts, that the attorney of record of the bankrupt shall not act for a creditor or for the trustee in bankruptcy, applies only to proceedings in bankruptcy, and it certainly is no defence to a suit in equity brought by the trustee in bankruptcy to recover assets of the bankrupt alleged to be in the possession of the defendant, that the plaintiff's attorney was attorney for the bankrupt in the bankruptcy proceedings. *Ibid.*

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estate with the payment of this note." She placed these instruments with her bank books and other documents in the pocket of a skirt belonging to her and had the pocket sewn up. She retained control of the skirt but at night intrusted it to the payee of one of the notes, to be taken upstairs away from the open window, with the understanding that upon her death the whole package was to be delivered to the person named in her will as executor. *Held*, that the instruments, which were bad as promissory notes for want of a consideration, also were void for want of delivery, and, even if they had been good and there had been a delivery, such instruments could not be made the subject of a *donatio causa mortis*. *Mason* v. *Gardner*, 515. And see GIFT, 1.

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2. The holder of a promissory note can sue the second indorser without first demanding payment from the first indorser, and it is no defence to the action against the second indorser that the plaintiff made an agreement with the first indorser to proceed against the second indorser only. *Bank of America* v. *Wilson*, 214.

Whether Payment.

3. In this Commonwealth the presumption, that a negotiable promissory note is payment of the debt for which it is taken, is a presumption of fact which may be rebutted by evidence showing that such was not the intention of the parties, and where it appears that treating the note as payment would deprive the party taking it of a security which he holds for the payment of the debt, this is strong evidence that the note was not accepted in payment. *Paddock & Fowler Co.* v. *Simmons*, 152.

Negligence in Collection.

4. If one, to collect a debt, makes a draft on his debtor payable to the order of a certain bank, and delivers it to that bank for collection, and the bank sends it for collection to another bank which fails to use due diligence in its collection, the first named bank is the agent of the maker of the draft and the maker as principal can maintain an action against the last named bank for any loss he has suffered through its negligence. *Lord* v. *Hingham National Bank*, 161.

5. If a bank receives a draft for collection in a letter of instructions saying "Return at once all items unpaid at maturity. They must not be held for the convenience of parties," and accompanied also by a slip requesting that the draft should not be protested, unless a custom of all banks to retain no protest items even when accompanied by such instructions is proved, it may be found that a failure to return the draft at once when not paid at maturity and holding it for the convenience of the drawee show negligence on the part of the bank, making it liable to the owner of the draft for the damages caused by the failure to return the draft promptly. *Ibid.*

6. In an action against a bank for a failure to return at once on non-payment at maturity a draft which had been sent to it for collection with

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instructions to do this, if it appears that when the draft matured the acceptor had property open to attachment to an amount much larger than the amount of the draft and did not intend to fail or make an assignment, and that the bank held the draft uncollected for nearly a month when the acceptor failed and made an assignment, the loss of the balance of the amount of the note over the dividend received from the estate of the debtor can be found to be a natural consequence of the failure of the defendant to return the draft promptly and not too remote to be recovered as damages. *Lord* v. *Hingham National Bank*, 161.

Mortgage Note.

Second mortgagee, who buys at sale to foreclose first mortgage and takes release from mortgagor and makes new mortgage to first mortgagee, may sue on note secured by second mortgage and recover balance of debt due him after foreclosure sale, as extinguishment of second mortgage does not extinguish debt, see MORTGAGE, 1.

BOARD OF HEALTH.

The provision of § 4 of St. 1897, c. 510, giving to any person aggrieved by an order passed by the State board of health under that act the right to appeal and file a petition for a jury within ten days from the service of such order upon him, or, in case of failure to do so by mistake, within thirty days from the service of the order upon him, applies only to orders made under § 3 of that act which are quasi judicial, and does not apply to rules, regulations and orders made by the board under § 1 of the act which are quasi legislative in character. See now R. L. c. 75, § 119. *Nelson* v. *State Board of Health*, 330.

BOND.

Where trustee gives bond conditioned on payment of specified sum on his ceasing to be trustee, action on bond may be brought after he ceases to be trustee before his accounts fully are settled, although demand was not made within six years after demand could have been made, if action is brought within twenty years from execution of bond, see LIMITATIONS, STATUTE OF, 2.

BOSTON.

As to liability of city of Boston in tort for negligence in construction of Stony Brook sewerage works authorized by St. 1897, c. 426, resulting in overflow of water on plaintiff's land, see MUNICIPAL CORPORATIONS, 6, 7; STATUTE, 1.

BOSTON ELEVATED RAILWAY COMPANY.

The provision of Pub. Sts. c. 113, § 32, requiring street railway companies to keep in repair the surface of the portions of the streets occupied by

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their tracks, which has been repealed as to street railway companies generally, remains in force as to the Boston Elevated Railway Company until June 10, 1922, when St. 1898, c. 578, § 26, repealing the provision is to apply to that corporation. See § 28. *Hyde* v. *Boston*, 115.

Pub. Sts. c. 113, §§ 32, 33, applicable to Boston Elevated Railway Company, require it to keep in repair only portions of streets under its rails and space between and not whole space occupied by sleepers beneath surface, see STREET RAILWAY, 3.

BOTTLES.

Filing and publication of name used as trademark on registered bottles made under St. 1893, c. 440, § 1, is good under R. L. c. 72, § 15, see STATUTE, 3.

If R. L. c. 72, § 18, authorizing search warrants in case of unlawful use and sale of registered bottles is unconstitutional, its unconstitutionality does not affect validity of § 16 imposing penalty for such use, and that section is constitutional, see CONSTITUTIONAL LAW, 6, 7.

BROKER.

Entitled to no commission on lease of real estate made after termination of his authority, see AGENCY, 2.

CARRIER.

Of Passengers.

One approaching and intending to board street car on highway not passenger on car before he reaches it, see STREET RAILWAY, 1.

CHARITY.

What constitutes.

1. A gift to the pastor and deacons of a church and their successors forever for the support of the church in its religious worship creates a public charitable trust. *Osgood* v. *Rogers*, 238.

Powers of Managers.

2. Where a will creating a charitable trust gave certain real estate to trustees and provided that they should "suffer and permit" the estate and every part of it to be under the "care, custody and management" of certain deacons, it was held that the legal title only was in the trustees, and that they could not deprive the deacons of their authority as managers of the trust estate. A similar result was reached as to certain pecuniary bequests to be held and managod by the same persons. *City Missionary Society* v. *Memorial Church*, 531.

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Application of Income.

Where bequest of fund as charitable trust provides that fund shall not be reduced below amount devised, if fund falls below that amount, whole of net income still to be applied to beneficiaries of income, see TRUST, 14.

Administration cy pres.

3. Although it is usual in applying a charitable fund *cy pres* to refer the matter to a master to report a scheme this court may frame a scheme directly or adopt one that is proposed. *Osgood* v. *Rogers*, 238.

4. A will contained the following provision: "At the death of my said Sisters and Brother I do give bequeath and devise all my interest in my said real Estate in two parts to the Pastor & Deacons of High Street Church and to the Pastor and Deacons of John Street Church to be by them disposed of for the support the said churches in their religious worship to be equally divided between the said churches — by creating a permanent fund, the interest and income of which whether in the improvement of the said lands or converting the same into funded securities yielding interest thereon — to the said Pastor & Deacons of High St. Church & to the said Pastor & Deacons of John St. Church and their successors forever — the division & enjoyment thereof to be in peace and harmony between the said churches." After administering one half of the fund for a time, the John Street church ceased to exist and the society voted to discontinue religious worship and to make proper disposition of their funds and other property. The High Street church originally was established by the aid and co-operation of the John Street church, and many former members and attendants of the John Street church attended worship there. The two churches were of the same religious denomination. *Held*, that the bequest was to the respective pastors and deacons of the two churches as tenants in common and not as joint tenants; that each gift was a public charity; and that the administration of the fund given to the pastor and deacons of the John Street church having become impracticable in the precise manner provided by its creator, the fund should be applied *cy pres* by paying it to the pastor and deacons of the High Street church to be administered by them for the support of religious worship in that church as nearly as might be in the manner in which the testator directed that it should be used for religious worship in the John Street church. *Ibid.*

COMMONWEALTH.

Where judgment has been recovered against city for injuries from defect in highway caused by contractor acting for Commonwealth, Commonwealth paying judgment is subrogated to rights of city against contractor, but cannot include in such subrogation counsel fees paid by Commonwealth to city solicitor employed by it, see SUBROGATION, 1, 2.

CONDITION.

Bequest on condition of securing $45,000 for building house of worship not complied with by securing fund of $48,000 for erecting meeting house and vestry either together or separately, see DEVISE AND LEGACY, 10.

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CONFLICT OF LAWS.

A will proved in the domicil of the testator in a foreign country is to be construed by the law of that country. *McCurdy* v. *McCallum*, 464.

CONSTITUTIONAL LAW.

Eminent Domain.

1. Where land is taken by right of eminent domain under a statute which requires a filing in the registry of deeds of a description of the land taken and provides that any person having an estate in any part of the land taken may file a bill in equity for damages within one year from the time of the taking, that the court shall cause notice of the pendency of the bill to be given to all persons having claims under the act in order that they may join in the suit and that any one who does not become a party within the time prescribed by the court shall be forever barred from recovering damages on account of such taking, a notice of the pendency of such a suit given by publication in accordance with an order of the court is sufficient to meet all constitutional requirements. *Sweet* v. *Boston*, 79.

If owner of land taken under statutory authority accepts payment in damages taking is good as to him, and *semble* that no one else can take advantage of irregularities, see EMINENT DOMAIN.

Taking land for hospital is exercise of power of eminent domain, so far as it affects owner, see *post*, 3.

Interference with use of neighboring property by mill site under mill act not taking of property under right of eminent domain, see MILL AND MILL PRIVILEGE, 2.

Vested Rights.

2. St. 1902, c. 443, giving the right to redeem land sold for taxes by paying the taxes to the collector instead of to the purchaser, is constitutional as applying to sales for non-payment of taxes assessed before its enactment. *Rogers* v. *Nichols*, 440.

Police Power.

3. A statute authorizing a city to take land for a hospital for the treatment of contagious diseases, although an exercise of the right of eminent domain so far as it affects the owner of the land taken, is in its general purpose an exercise of the police power for the protection of the public health. *Manning* v. *Bruce*, 282.

4. St. 1902, c. 465, authorizing the city of Everett to take land for a hospital for the treatment of contagious diseases, is constitutional. *Ibid.*

The mill act, R. L. c. 196, is constitutional, see MILL AND MILL PRIVILEGE, 1.

Public Purpose.

5. St. 1904, c. 458, attempting to give bounties to those veterans of the Civil War who did not receive bounties at the time of their enlistment, is unconstitutional, as requiring the expenditure of money from the public treasury for a private use. *Opinion of the Justices*, 603.

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Class Legislation.

6. R. L. c. 72, § 16, imposing a penalty of fine or imprisonment for the use and sale of registered bottles without the written consent of the person whose name is on the bottles unless purchased from him, is not unconstitutional as class legislation or otherwise. *Commonwealth* v. *Anselvich*, 376.

Retroactive Laws.

St. 1895, c. 427, making valid marriages entered into in good faith if after removal of impediment parties continue living together in good faith, applies to case where impediment existed before enactment of statute and was removed after its enactment, and so applied is constitutional, see MARRIAGE, 3.

St. 1902, c. 443, giving right to redeem land sold for taxes by paying taxes to collector is constitutional as applying to sales for non-payment of taxes assessed before its enactment, see *ante*, 2.

Unconstitutionality of Part of Statute.

7. The constitutionality of R. L. c. 72, § 18, authorizing the issuing of search warrants in case of the unlawful use and sale of registered bottles was not passed upon in this case, but it was *held*, that, if that section is unconstitutional, its unconstitutionality does not affect the validity of § 16 of the same chapter imposing a penalty of fine or imprisonment for the unauthorized use and sale of registered bottles. *Commonwealth* v. *Anselvich*, 376.

Legislative Exercise of Judicial Powers.

8. St. 1896, c. 321, authorizing the commissioners appointed under St. 1890, c. 428, on a petition for the alteration of the grade crossings of the railroad of the Old Colony Railroad Company on Tremont Street in Boston, to prescribe the manner in which other grade crossings on the Providence division of the New York, New Haven and Hartford Railroad Company in Boston should be abolished, is not unconstitutional as an attempt of the legislative department to interfere in judicial proceedings, but merely gave the commissioners additional powers to be exercised under the direction of the court. *Lancy* v. *Boston*, 128.

Opinions of the Justices.

9. The justices of this court in giving opinions upon important questions of law to a branch of the Legislature or to the Governor and Council in performance of the duty imposed upon them by the Constitution of the Commonwealth, c. 3, art. 2, give their opinions only so far as required to aid in the performance of official duties in regard to a matter then pending. *Opinion of the Justices*, 603.

CONTRACT.

What constitutes.

1. Where in an action of contract the evidence warrants a finding that the plaintiff and the defendant made an oral agreement upon the terms of a

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contract in writing between the defendant and a third person, the plaintiff may sue on the oral contract without showing an assignment to him of the contract in writing. Following Plunger Elevator Co. *v.* Day, 184 Mass. 130. *American Electrical Works* v. *New England Electric Railroad Construction Co.* 546.

2. In an action against a manufacturing corporation by a superintendent of its factory for alleged breach of contract in discharging the plaintiff from its employ, it appeared, that the plaintiff worked for the defendant as superintendent for one year at a salary of $3,500 a year and in the following year, in which he alleged that the defendant again employed him, he continued to work as superintendent for about seven months and was paid at the same rate up to the time of his discharge. *Held*, that this was evidence of some contract express or implied on the part of the defendant to employ the plaintiff as superintendent in the second year, and that the fact that the employment was continuous had an important bearing on the matter. *Dunton* v. *Derby Desk Co.* 35.

3. In an action against a manufacturing corporation by a superintendent of its factory for alleged breach of contract in discharging the plaintiff during a second year after he already had been employed as superintendent at a certain salary for one year, if the presiding judge correctly instructs the jury that the plaintiff, to prevail, must prove that both parties must have understood that there was a contract for the second year, it does not matter that he also gives other instructions as to what the plaintiff had the right to understand, especially where these instructions also are correct. *Ibid.*

Account Stated.

4. In an action by an attorney at law for compensation for professional services, with a count upon an account stated and another count upon an account annexed for a larger sum, it appeared that the parties agreed upon a settlement by the payment of the sum named in the count upon an account stated and by the passing of receipts, that the defendant said that he would give a check on the spot but neither party had a blank check on the defendant's bank, that for a number of days the plaintiff expected to receive the check and the defendant made promises to send it, and that before bringing his action the plaintiff notified the defendant that unless he received the check by a certain day he should sue. *Held*, that upon this evidence it could not be ruled as matter of law, either that the settlement was conditional or that the defendant procured it by a fraudulent promise to give a check on the spot, and the plaintiff was allowed to recover only the sum named in his count upon an account stated. *Wood* v. *Sherer*, 562.

Implied: Common Counts.

5. If an action for money had and received can be maintained to recover money which in equity can be traced to the hands of the defendant, the recovery must be confined to cases where money is received for the plaintiff by some one standing toward him in a fiduciary capacity. *Cole* v. *Bates*, 584.

6. In this Commonwealth it is settled that money had and received will lie

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where the defendant has received money to which the plaintiff has an equitable right, and in this case it was assumed, without deciding it, that, where the plaintiff in equity can trace his money into the hands of the defendant, he can recover it from him in an action for money had and received as well as where the defendant received the money in the first instance. *Cole* v. *Bates*, 584.

7. If the executor under the will of a deceased husband draws out a savings bank deposit belonging to the widow of his testator, claiming it as part of the estate, and pays it to the residuary legatee, the payment by the bank to the executor is wrongful, and the money paid is not the money of the widow, having been paid upon a demand adverse to her. Therefore neither the widow, nor the administrator of her estate, can follow the money in equity or maintain an action for money had and received for it against the residuary legatee under the will of the husband. *Ibid.*

8. A contract with a city, for the repair of a wooden bridge forming part of a highway, provided that the timber and other woodwork of the carriage way, wherever decayed, should be replaced by sound material, the contractor to be paid a certain sum per thousand feet for new material wrought into the bridge, and that no work should be begun until material for at least one half of the repairs contemplated should be "upon the job." Complying with this condition, the contractor distributed lumber "all along the bridge" and upon the river banks. While the work was proceeding the bridge and the lumber upon it were destroyed by fire. *Held*, that the city was not liable for lumber thus destroyed which had been distributed for use in the work but not wrought into the bridge, its liability being confined to paying for such portion of the work and materials as had become identified with the bridge at the time of its destruction. *Young* v. *Chicopee*, 518.

Where executors borrow money to carry on business of testator and give note therefor, they are liable as for money lent or money had and received if not liable on note, see EXECUTOR AND ADMINISTRATOR, 4.

Referee passing on account annexed for work and materials properly may include in his report matter not mentioned in account if report shows matter was part of work and declaration might have been amended by including it in description of work in account annexed, see PRACTICE, CIVIL, 30.

Where city maintaining almshouse keeps no account with individual inmate who performs services equal to cost of his maintenance inmate cannot recover from city for services and city cannot recover from him for cost of support, see PAUPER, 1, 2.

Validity.

Fair voluntary contract between wife and trustee acting for husband for support of wife who agrees not to make further claim on husband for support is valid, see HUSBAND AND WIFE, 2.

By-law of savings bank providing against payment of deposit without production of book unless its loss is proved "to the satisfaction of the trustees or the treasurer" cannot oust court of jurisdiction to determine whether book is lost, see SAVINGS BANK.

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Construction.

General rules.

9. Where a contract in writing contains inconsistent provisions, a clause which requires something to be done to effect the general purpose of the contract is entitled to greater consideration than one which tends to defeat a full performance. *Morrill & Whiton Construction Co.* v. *Boston*, 217.

10. The rule of construction, that the language of an instrument in writing in case of doubt is to be construed against the party using it, is not to be resorted to where the intention of the parties otherwise appears. *Aldrich* v. *Bay State Construction Co.* 489.

Whether for court or jury.

11. Where it appears at a trial that a contract was made by an oral offer accepted by a letter, the presiding judge may give his construction of the letter with reference to the circumstances which the evidence tends to establish as existing when it was written, and leave to the jury the question whether the existence of those circumstances has been established by the evidence. *Ibid.*

Of building contract.

12. A contract for the erection of a municipal building for a round sum of money contained a specification for plastering, then after certain specifications about carpentry came a paragraph containing a provision requiring the contractor to furnish and do everything for the construction of the building "except the plastering and the parts of the heating and ventilating, and plumbing systems," and later came full specifications for plastering. *Held*, that the contractor was bound to do the plastering as part of the contract, the exception of the plastering being rejected as repugnant to the rest of the contract and inconsistent with its general purpose "to erect and complete a municipal building." *Morrill & Whiton Construction Co.* v. *Boston*, 217.

Time of the essence.

13. Where the time for the performance of a contract for the sale of most of the property of a corporation, including its going business and outstanding contracts, is extended by the parties for a period of one month and four days, and $2,500 is paid in cash for the extension besides the giving of additional security to be forfeited on non-performance, this shows conclusively the intention of the parties to make time of the essence of the contract. *Garcin* v. *Pennsylvania Furnace Co.* 405.

Of option to take payment in either of two things.

14. In an action of contract for the price of street railway ties furnished to a construction company, it appeared, that the defendant offered to buy the ties from the plaintiff, paying in cash a price less than that asked by the plaintiff, or paying him the full price in the stock of either of two street railway companies, the G. & T. or the D., at the plaintiff's option. The plaintiff replied in a letter that he would sell the ties at the full price and "take stock in either the G. & T. or D. roads." The ties were delivered and the plaintiff demanded payment in G. & T. stock, which the defendant

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refused, claiming the right to pay him in stock of the D. road, which the plaintiff refused to receive. *Held*, that the plaintiff's letter did not necessarily mean that the defendant might pay him in either of the two stocks at its option, but might be found to mean, that the plaintiff would take his pay in the stock of one or the other of the two roads as he might elect, in accordance with the defendant's offer. *Aldrich* v. *Bay State Construction Co.* 489.

Of contract to sell goods if called for before certain day.

15. An agreement headed "Contract" was as follows: "Gloucester, Mass., June 2, 1902. Messrs. C. C. & M., Boston, Mass. We this day enter you on contract for the following: Article, Jervell's 1902 Norwegian Cod Oil. Quantity: 10 bbls. Price: $33 per bbl. F. O. B. Boston. Terms: Net 30 days, less 1% 10 days. Deliveries: To be delivered in lots as wanted prior to April 1st, 1903. D. & Co." "Accepted, C. C. & M., 6/3/02." In an action by C. C. & M. against D., doing business as D. & Co., for a refusal to deliver certain barrels of oil demanded under this contract after April 1, 1903, it was *held*, that there was nothing in the instrument, as construed in the light of the correspondence between the parties, to show clearly a sale of ten barrels of oil for future delivery rather than an agreement to sell that number of barrels if called for before April 1, 1903, and that the plaintiffs had not sustained the burden of proving a breach of contract by the defendant. *Carter* v. *Dodd*, 386.

Of bill of sale.

In certain bill of sale of all assets of corporation insurance policies held not to be included in round price but seller credited with pro rata value of policies, see SALE, 8.

Of life insurance policy.

Policy of life insurance payable to wife and daughter of insured "or if they are not living to the executors" of the insured is payable to estate of insured only if both wife and daughter are dead, and there is no implication that if one of them is dead one half of insurance money is payable to estate of insured, see INSURANCE, 3.

Of by-law of savings bank.

Under by-law of savings bank providing against payment of deposit without production of book unless its loss is proved "to the satisfaction of the trustees or the treasurer" depositor may recover deposit if loss of book is proved by evidence sufficient to satisfy reasonable man, see SAVINGS BANK.

Performance and Breach.

16 In an action of contract for a balance alleged to be due for wire sold by the pound, under an agreement by which the plaintiff was to furnish the wire called for by the defendant under the terms of the contract, the defendant is not entitled to a ruling that there is no evidence that the contract was fully performed by the plaintiff, if there is evidence that the plaintiff delivered all the wire called for by the defendant under the contract. *Am. Elec. Works* v. *N. E. Elec. R. R. Con. Co.* 546.

Agreement "We this day enter you on contract for the following . . . To

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be delivered in lots as wanted prior to April 1st," held not to show clearly sale for future delivery rather than agreement to sell if called for before April 1, see *ante*, 15.

Where consideration is paid for extension of time for performance of contract of sale, time is of essence, see *ante*, 13.

One who uses machinery made for him for several months after giving notice of rejection loses right to reject it as not being in accordance with contract and cannot recover money paid on account of it but only can sue for breach of contract, see SALE, 2.

CONVERSION.

Lessee removing goods of tenant at sufferance from leased premises has no right to put them in storehouse if owner is present and objects, see LANDLORD AND TENANT, 7.

Where screening and weighing of onions is prerequisite to passing of title and seller rescinds contract before screening and weighing, sale of onion by buyer before screening and weighing is conversion without demand and refusal, see SALE, 5.

CO-OPERATIVE ASSOCIATION.

1. A purchase of shares in a co-operative association incorporated under Pub. Sts. c. 106, is in effect a loan upon interest. A shareholder may withdraw his money under the terms of a by-law of the corporation giving him the right of withdrawal on notice, and if the corporation refuses to return the money he can maintain an action for it. *Lindsay* v. *Arlington Co-operative Assoc.* 371.

2. A by-law of a co-operative association incorporated under Pub. Sts. c. 106, contained the following provision: "Any member of this association desiring to withdraw from the association the whole or any part of his or her stock shall make a written application to the directors, and within thirty days from the date of such application the board shall pay or cause to be paid such applicant the amount of shares he may desire to withdraw, but if the board fail to pay or cause the same to be paid within thirty days, said applicant may transfer his or her shares to any other member." *Held*, that by its true construction this by-law required the association to pay to a withdrawing stockholder the par value of his shares, and so construed was valid. *Ibid.*

CORPORATION.

By-laws.

By-law of co-operative association construed to require association to pay to withdrawing stockholder par value of shares and so construed held valid, see CO-OPERATIVE ASSOCIATION, 2.

For construction of by-law of savings bank, see SAVINGS BANK.

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Authority of Officers.

Whether the general manager of a manufacturing corporation had authority to employ a superintendent of the corporation's factory, properly may be treated as a question of fact. *Dunton* v. *Derby Desk Co.* 35.

Where stock had no market value, treasurer allowed to give his opinion of its fair value, see EVIDENCE, 11.

Record in suit in equity against corporation to foreclose mortgage and for appointment of receiver admissible to show worthlessness of its shares, see DECEIT, 2.

In suit in equity by bondholders of corporation against trustees appointed by bondholders to turn over property of corporation to new corporation for an accounting, new corporation is not necessary party, see EQUITY PLEADING AND PRACTICE, 1.

CUSTOM.

Evidence of custom not admissible to change plain terms of contract in writing, see EVIDENCE, 18.

In action on fire insurance policy plaintiff cannot vary contract by proving custom to waive under certain circumstances requirement in policy of sworn statement of loss, see INSURANCE, 2.

DAMAGES.

For Property taken under Statutory Authority.

1. St. 1867, c. 308, authorizing the city of Boston to take certain land in that city for the purpose of raising its grade in order to abate a nuisance, provided in § 2 that any person entitled to an estate in any part of the land so taken might "at any time within one year from the time when the same shall be taken, as well in his own behalf, as in behalf of all other persons having estates in the land so taken, file a bill in equity" to recover damages, that thereupon the court should cause notice of the pendency of the bill to be given to all persons named as defendants and all persons in whose behalf the bill should be filed and that any person failing to appear and become a party within the time prescribed by the court should be forever barred from recovering any damages on account of such taking. Such a bill being filed, the court prescribed notice thereof by publication in two newspapers in Boston, which was given. Many years later one claiming an estate in part of the land taken, but who had not become a party to the former suit, brought a bill in equity for damages, alleging that he was a minor residing outside of the Commonwealth and that he first had actual notice or knowledge of the former suit or of the taking of the land within a year from the filing of his bill. *Held*, that the suit was barred by the limitation of the statute, and that, the proceeding by which the land was taken being *in rem*, the facts that the plaintiff had no actual notice or knowledge of the taking and that he was a non-resident and a minor were immaterial, the statute making no exception in favor of non-residents or minors. *Sweet* v. *Boston*, 79.

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Where executrix was directed to carry on business of testator, property was held to be vested in her as trustee and she as executrix alone was allowed to maintain petition for damages for taking of property under statutory authority, see EXECUTOR AND ADMINISTRATOR, 7.

For Loss of Water Power.

2. On a petition against the city of Worcester for damages caused by its taking of the waters of Kettle Brook under St. 1895, c. 384, the petitioner and the respondent agreed that all damages, except for the value of the use of the waters of the brook for purposes of power, should be submitted to a referee. This was done and an award was made and accepted. On a claim for the damages excepted, heard by commissioners and afterwards tried in the Superior Court, it was *held*, that the diminution in value in the parts of the property which had been procured or constructed in order to make the right to use the water available was included in the former award for property taken, and was not a part of the excepted claim for damages for value of the brook for purposes of power; *also*, that the right of the petitioner to use its dam, and its flowage rights in the lands of others conveyed to it by deeds, likewise were parts of the property taken and therefore were included in the former award; *also*, that evidence of the cost of reproducing the dam, and evidence of the special value of the water for washing and scouring, rightly were excluded as immaterial in assessing the value of the water for purposes of power, the only question open. *Lakeside Manuf. Co.* v. *Worcester*, 552.
3. In assessing the damages of a mill owner, for loss of water power by the taking of the waters of a stream as a water supply, it is right to refuse to instruct a jury, that, if the substitution of steam power for water power would be a reasonable and proper mode of using the property after the taking of the water, the measure of the petitioner's damages due solely to the taking of the water power "is the cost of producing annually a full equivalent therefor by the substitution of steam power for the water power taken"; because, although this would be a proper subject for consideration by the jury, it cannot be said as matter of law that the measure of damage is the cost that might result from a certain reasonable mode of repairing the damage, to the exclusion of other reasonable and proper modes; also because such an instruction would assume that present conditions would remain unchanged; and also because the cost of procuring another kind of power at great expense would include an expenditure made necessary on account of damage which otherwise would come to the other property of the mill owner, and therefore would exceed the amount of damage due solely to the taking of the water power. *Ibid.*
4. On a petition by a mill owner for damages from the taking of a stream as a water supply, upon the issue of the value of the water power to the petitioner, evidence as to the value of the use of water in connection with a reservoir below the petitioner's mill receiving part of its water from a watershed which did not supply the petitioner's pond, properly is excluded as too remote. *Ibid.*
5. On the issue of the value to a mill owner of the water power of a stream

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Damages (*continued*).

taken as a water supply, a question, as to the average daily yield in horse power from the watershed feeding the stream, including times of the highest water and of the lowest, may not be competent to show the usual available power of the stream, where it appears that at certain seasons of the year a large amount of surplus water ran to waste. *Lakeside Manuf. Co.* v. *Worcester*, 552.

6. At the trial of a petition by a mill owner for damages from the taking of a stream as a water supply, on the issue of the value of the waters for purposes of power, the presiding judge in the exercise of his discretion properly may refuse to allow a mechanical engineer having a large experience with steam power, who has no knowledge of values in the neighborhood, except that of a mechanical engineer, to state, from his knowledge of the cost of producing horse power in that locality and in other localities, what was the value per horse power of the power of the stream at the petitioner's mill, the judge allowing the witness to give the cost of producing the power. *Ibid.*
7. At the trial of a petition by a mill owner for damages from the taking of a stream as a water supply, on the issue of the value of the waters for purposes of power, the presiding judge in the exercise of his discretion properly may refuse to allow an expert in hydraulic engineering familiar with the cost and value of water power and steam power, but having no knowledge of the value of real estate in the town where the petitioner's mill is situated, or elsewhere, and knowing of no sales of power apart from land, to give his opinion as to the value of the waters of the stream in question and as to the damage to the petitioner's property caused by the taking of the waters. *Ibid.*
8. At the trial of a petition by a mill owner for damages from the taking of a stream as a water supply, on the issue of the value of the waters for purposes of power, where a mechanical engineer of large experience in connection with steam engines and the production of power by steam, who made tests of the engines at the petitioner's mill before the stream was taken, has testified at length and in detail as to what it would cost to produce steam power at this mill, and then says that to produce it with a new steam plant and under the most favorable conditions would cost somewhat less than the amount he has stated, as he made his estimates of the cost under existing conditions at the mill, and if he further says that he then cannot state how much less, the presiding judge may in his discretion order the testimony to be stricken out and give the witness an opportunity to present another estimate later. In making an estimate of the cost of production of power, as the basis of a general assessment of damages for all time, the best test would be the cost under the most favorable conditions, and not under conditions merely temporary. *Ibid.*
9. At the trial of a petition by a mill owner for damages from the taking of a stream as a water supply, on the issue of the value of the waters for purposes of power, the presiding judge in his discretion properly may exclude the opinion of a witness founded wholly on the value of the plant of his own mill farther down the stream arrived at from an offer made for it. *Ibid.*

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10. At the trial of a petition by a mill owner for damages from the taking of a stream as a water supply, the petitioner cannot ask the trustee of a savings bank at what rate of interest, at the time of the taking, money could be invested safely for a long term of years, this being too remote and too uncertain to be of assistance in assessing the damages. *Lakeside Manuf. Co.* v. *Worcester*, 552.

11. At the trial of a petition by the owner of a mill in a small town for damages from the taking of a stream as a water supply, on the issue of the value of the waters for purposes of power, the presiding judge properly may exclude the testimony of a witness as to the value of power in a certain city, in the absence of evidence that the value of power in the small town where the petitioner's mill is situated is the same as its value in the city. *Ibid.*

Petition for damages from "alteration of" certain street "by widening, straightening and relocation" is petition for damages from alteration of highway under R. L. c. 48, § 1, and not from mere relocation under R. L. c. 48, § 12, see WAY, 3.

In action against bank for failure when holding draft for collection to return it at once on non-payment at maturity as instructed, loss from debtor's subsequent insolvency held natural consequence of delay where at time of maturity debtor had sufficient property open to attachment and did not intend to fail, see BILLS AND NOTES, 6.

DECEIT.

1. Oral false and fraudulent representations as to the financial credit of a corporation made to induce the plaintiff to subscribe for shares of the corporation and pay for them in cash are actionable. Wells *v.* Prince, 15 Gray, 562, distinguished. *Walker* v. *Russell*, 69.

2. In an action for false and fraudulent representations as to the financial credit of a corporation whereby the plaintiff was induced to subscribe for its shares, if it appears that the corporation suffered no accident or disaster between the time of the representations and the filing of a bill in equity against it to foreclose a mortgage on its property and for the appointment of a receiver, the plaintiff properly may be allowed to put in evidence the record of the suit in equity as bearing on the value of the shares. *Ibid.*

DEED.

Construction of Trust Deed.

Where will is subject to trust deed which provides that trustee, also named as executor in will, may use income from trust property in defending estate from claims deemed unjust and in sustaining will, words "may use" are permissive and not mandatory, see TRUST, 7.

DESERTER.

1. U. S. St. 1865, c. 79, § 21, depriving a deserter from the United States army of his rights as a citizen of the United States applies only to persons

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Deserter (*continued*).

legally adjudged guilty of desertion by a competent tribunal, and the fact that a person is recorded as a deserter in the office of the adjutant general of this Commonwealth does not subject him to the penalties of the crime of desertion under that statute, even if it is admitted that this entry in the record is true. *Commonwealth* v. *Wong Chung*, 231.

2. Whether the penalty imposed by U. S. St. 1865, c. 79, § 21, on a person found guilty of desertion from the army of the United States, depriving him of his rights as a citizen of the United States, deprives him also of a previously existing right as a citizen of this Commonwealth to vote for members of the General Court, and thus disqualifies him as a juror, *quære*. *Ibid.*

DEVISE AND LEGACY.

Construction.

Supplying omitted words.

1. Words omitted from a will presumably by mistake can be supplied by the court only when the words used by the testator show by necessary implication what words were omitted. Following Child *v.* Child, 185 Mass. 376. *Boston Safe Deposit & Trust Co.* v. *Buffum*, 242.

What estate passes.

2. A testator having a son and a daughter left to his son $100 "if in the opinion of the trustees he is worthy of it," and left the bulk of his property to trustees, to convert it wholly into personal property and pay the net income to his daughter "for her sole use and benefit during her natural life." At the time of the testator's death his next of kin were his son and daughter. *Held*, that as to the disposition of his property after the death of his daughter the testator died intestate. *Ibid.*

3. A will, after giving $5,000 outright to a nephew and the same sum outright to a niece of the testator, gave to trustees, in trust for the same nephew and niece, "the sum of ten thousand dollars the net income to be paid them equally during their lives." *Held*, that each of the legatees took an equitable life estate in one half of the gift of $10,000, and that they took this interest as tenants in common and not as joint tenants, so that, on the death of one of them, the trust should be terminated as to one half of the fund of $10,000, which should be distributed under the residuary clause of the will, this construction being confirmed by provisions in other portions of the will. *Loomis* v. *Gorham*, 444.

4. A testator devised one half of the residue of his estate to a certain niece, providing that if she should die and her husband should survive her the property should go to her husband and after his decease to his children, and that if he should leave no children it should go to the testator's heirs. At the testator's death, the niece, her husband and a son of the niece and her husband were living. The niece's husband died before her and later the son died intestate and unmarried during his mother's lifetime. *Held*, that if the niece took a fee subject to be divested, it had become absolute, and that if she took a life estate with a remainder for life in her husband and a remainder in fee to such of his children as survived him, the remain-

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der vested absolutely in the son on the death of his father and on the death of the son intestate and unmarried passed to his mother as his heir giving her the whole estate in fee. *Gilkie* v. *Marsh*, 336.

5. A testator left the residue of his property to trustees to expend such portion of the net income as in their judgment should be deemed necessary for the proper support, maintenance and education of his children in such proportion as to each child and in such manner as they might deem wise and prudent until his children should arrive at the age of twenty-one years, and to add the residue of the income to the principal, and when and as often as his children should arrive at the age of twenty-one years to pay over to them respectively on arriving at that age an equal share of the income derived from the trust property, proportionate to the number of his children then living and the issue of any deceased child representing their deceased parent, until the youngest of the testator's children surviving should arrive at the age of twenty-one years, and then to convey and transfer the property to the testator's children then living and the issue of any deceased child by right of representation. *Held*, that the children of the testator were not to receive equal shares of the income from the beginning to the final distribution including what was necessary for their education and maintenance, but that they were to receive according to their respective necessities until arriving at the age of twenty-one years, and after that their shares of the income as prescribed by the will until the time for the distribution of the fund, when each should receive an equal share. *Williams* v. *Thacher*, 293.

6. A will contained the following provisions: "I give and bequeath all the rest and residue of my personal property to my brother C. and at his decease to descend to his family to be divided among them in accordance with the laws of the State of Maine." The next paragraph was as follows: "In order to carry out the provisions of this my last will and testament, I hereby direct my executors hereinafter named to bargain sell and dispose of all my real estate in Clinton aforesaid, either at private sale or public auction as in their judgment they may deem wisest and best, to make deed or deeds for conveyance of same." In the preceding portion of the will was a bequest of $7,000 in trust for the testatrix's brother C. for life with a remainder to two of his children alternatively. The will was made about three weeks before the death of the testatrix. Her personal property was insufficient by the amount of $5,000 to pay charges, debts and legacies, and the residue consisted wholly of real estate. *Held*, that the residue was to be converted into personal property and was bequeathed to the testatrix's brother C. absolutely. *Thissell* v. *Schillinger*, 180.

In will proved before St. 1888, c. 273, devise to one and if he shall "die without issue" to testator's heirs creates estate tail in first taker, see ESTATE TAIL, 1.

Who entitled: date of ascertainment.

7. A bequest to the brothers and sisters of the testator, after a life interest in one of them, means a bequest to the brothers and sisters of the testator living at the time of his death including the beneficiary for life, unless

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there is something in the will to show a different intention. *Smith* v. *Smith*, 138.

8. A testatrix bequeathed a certain sum of money to a trustee as follows: "in trust for N. R. wife of H. R., . . . the interest of said sum to be paid to her annually and in case of the death of H. R. the principal to be paid to her thus terminating the trust. In case of the death of N. R. before the death of her husband the property is to be paid to the brothers and sisters of the testator." N. R., who was a sister of the testatrix, died before her husband. A brother of the testatrix died after the testatrix and before N. R. *Held*, that the bequest in remainder, contingent on the death of N. R. before her husband, was to the brothers and sisters of the testatrix living at the time of her death including the deceased brother and N. R. *Ibid.*

9. A will gave the residue of the estate of the testatrix to trustees to pay the net income in equal shares to her seven children named for life, and proceeded as follows: "In the event of the death of either of my said children, and as they may severally decease, I give, devise, and bequeath, his or her equal share in said trust fund, and any accumulated interest thereon, to his or her lawful issue, upon their arriving to the full age of twenty-one years, and in the event of the death of any of my said children, without lawful issue living, or if living, and not arriving to the full age of twenty-one years, I give, devise, and bequeath, his or her interest in said trust fund to the surviving children and their heirs and assigns forever, share and share alike, my daughters' share to continue in trust, as is herein provided for the original share." All of the children survived the testatrix. One of them died leaving a son, and later another died without issue. *Held*, that the son of the child first deceased did not share in the remainder which took effect on the death of the other child without issue, as the words "surviving children" referred to those surviving at the death of one of the children, and did not include grandchildren. Balch *v.* Pickering, 154 Mass. 363, distinguished and doubted. *Lawrence* v. *Phillips*, 320.

Whether precatory trust.

Bequest of money to one with "request" that she give it at her death to her daughters held to create precatory trust, see TRUST, 2.

Gift by will of all property of testatrix in "full confidence" that beneficiary will carry out request of testatrix held not to create precatory trust, see TRUST, 3.

Of charitable trust.

Bequest to two churches held to create public charitable trust for them as tenants in common to be applied on discontinuance of one church entirely for other, see CHARITY, 1, 3, 4.

As to termination of trust.

Under will providing for termination and distribution of trust fund for children when youngest reaches twenty-one, and providing also for life interest in portion of fund in testator's sister, although sister still is living when youngest child reaches twenty-one, trust then should be terminated as to all property except that in which sister has life interest, see TRUST, 9.

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Compliance with Condition.

10. The condition of a bequest of $5,000, "as a nucleus of a fund" for the building of a house of worship if $45,000 additional is secured for that purpose within ten years, is not complied with by securing a fund of $48,000 for the purpose of erecting a meeting house and vestry which might be erected together or separately, no part of the fund having been secured for the purpose of erecting a meeting house alone and nearly all of it having been expended in erecting a vestry alone. *Trustees Ministerial Fund* v. *First Parish in Cambridge*, 85.

Evidence of Attending Circumstances.

To establish precatory trust under will evidence is admissible that beneficiary eleven years before went to live with testatrix on her agreement to leave him her property, and that before her death she declared that her property was depreciating, see TRUST, 4, 5.

DISCRETION OF COURT.

Recommitting of master's report is not open to revision, see EQUITY PLEADING AND PRACTICE, 5.

Motion to recommit report of assessor is within discretion of presiding judge, see PRACTICE, CIVIL, 28.

Introduction of testimony in rebuttal is within discretion of judge, see PRACTICE, CIVIL, 9.

Cross-examination of witness on collateral matters for purpose of testing accuracy and understanding largely within discretion of judge, see WITNESS, 1.

Granting of new trial in criminal case on account of disability of juror not known to defendant until after his conviction is within discretion of judge, see PRACTICE, CRIMINAL, 2.

Within discretion of judge to deny motion of plaintiff made before trial to be allowed to come into court to testify in reclining position, see PRACTICE, CIVIL, 10.

Within discretion of court to refuse to order jury to take view of plaintiff at her home, see PRACTICE, CIVIL, 31.

Denial of new trial asked on account of comments of counsel on matters not in evidence held proper exercise of discretion of court under circumstances, see PRACTICE, CIVIL, 24.

DIVORCE.

Alimony.

Whether woman holding execution for alimony, without attachment or levy of execution, is creditor of former husband, *quære*, but if creditor she has no lien and is not party aggrieved entitled to appeal from decree of Probate

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Court allowing final account of guardian of former husband, see PRACTICE, CIVIL, 7.

Where one against whom decree for divorce has been obtained under Pub. Sts. c. 146, marries within two years another who acts in good faith, and parties live together beyond expiration of two years from divorce, marriage is valid within St. 1895, c. 427, which is constitutional, see MARRIAGE, 1–3.

DOG.

One entering premises of another and bitten by watch dog while picking up rope can be found not in exercise of due care, see NEGLIGENCE, 2.

DONATIO CAUSA MORTIS.

See GIFT.

DOWER.

1. Under Pub. Sts. c. 127, § 20, (R. L. c. 135, § 18,) where a widow has not waived the provisions made for her in her husband's will she cannot have dower set out to her unless it appears by the will that the provisions were in addition to her dower. *Matthews* v. *Thompson*, 14.

2. Where a conveyance by a husband through a third person to his wife as trustee is void as in fraud of creditors, and the wife without consideration has executed the deed in release of dower, if the conveyance is set aside as fraudulent the release falls with it and the wife regains her dower right. *Ibid.*

Right of widow to dower in land conveyed by husband by deed absolute in form but really given as security, see EQUITY JURISDICTION, 15, 16.

EASEMENT.

Owners of adjoining buildings may acquire by prescription mutual easements of support and shelter. *Fleming* v. *Cohen*, 323.

ELECTION.

Quære, whether penalty imposed by U. S. St. 1865, c. 79, § 21, on deserter of loss of rights as citizen of United States, deprives him of right to vote as citizen of Massachusetts, see DESERTER, 2.

ELEVATOR.

Semble, no negligence in permitting movable stool to remain in passenger elevator for use of operator, see NEGLIGENCE, 23.

Whether presence of movable stool in passenger elevator is negligence not proper subject for expert testimony, see EVIDENCE, 7.

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Where operator of elevator starts it causing accident by grasping lever when falling back in trying to sit on stool which has been moved without his knowledge, grasping of lever and not presence of stool is proximate cause of accident, see NEGLIGENCE, 24.

As to liability for injury from fall of freight elevator caused by defective clutches or uprights, see NEGLIGENCE, 25–27.

EMINENT DOMAIN.

When land is taken under statutory authority, if the owner chooses to waive irregularities in the taking and accepts payment in damages, the taking becomes good as to him; and *semble* that no one else can take advantage of the irregularities. *Manning* v. *Bruce*, 282.

Taking by Everett under St. 1902, c. 465, of certain land for hospital for treatment of contagious diseases is valid, see EVERETT; CONSTITUTIONAL LAW, 4.

Taking land for hospital is exercise of power of eminent domain, so far as it affects owner, see CONSTITUTIONAL LAW, 3.

Sufficiency of notice by publication of taking by eminent domain, see CONSTITUTIONAL LAW, 1.

Interference with use of neighboring property by mill site under mill act is not taking of property under right of eminent domain, see MILL AND MILL PRIVILEGE, 2.

ENTRY, WRIT OF.

See REAL ACTION.

EQUITY JURISDICTION.

To compel an Accounting.

One may maintain suit for accounting where he had no notice of matters complained of until shortly before filing of bill and in ignorance accepted securities in satisfaction of his claim, see *post*, 6.

Bill for Instructions.

1. A question as to the parties to be joined in a bill for instructions is not a proper subject for a prayer in such a bill. *City Missionary Society* v. *Memorial Church*, 531.

To reach and apply Equitable Assets.

2. Whether a debtor's interest in the good will of a business can be reached in a suit of equitable attachment under R. L. c. 159, § 3, cl. 7, *quære*. *Crossman* v. *Griggs*, 275.

3. In this suit in equity under R. L. c. 159, § 3, cl. 8, to reach and apply to a debt due the plaintiff certain property fraudulently conveyed by the debtor to a certain corporation, it was held that the plaintiff was entitled

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to equitable relief, there being evidence of fraud on the part of the debtor and of the corporation. *Krower* v. *Felz*, 391.

4. Where the funds of a corporation are in the hands of a receiver appointed in a pending suit in equity, a creditor of a creditor of the corporation cannot maintain an intervening petition to reach and apply to his claim any dividend which the creditor of the corporation named as respondent in the intervening petition may be entitled to receive from the funds in the hands of the receiver. *Williston Seminary* v. *Easthampton Spinning Co.* 484.

For suit by creditor of executors to obtain payment of money lent to them from one who bought assets of executors agreeing to assume and pay all debts incurred by them, see EXECUTOR AND ADMINISTRATOR, 4.

Laches.

5. The mere fact that for a period of twenty years no bill in equity was brought to establish an oral trust in real estate held by an absolute legal title does not amount to laches, if during the whole of that period the trust was recognized by the parties and the delay was not accompanied by any change for the worse in the situation of the holder of the legal title. *Potter* v. *Kimball*, 120.

6. In a suit in equity for an accounting, by a bondholder for himself and other bondholders against trustees appointed by the bondholders to enforce the mortgage securing the bonds and turn over the property to a new corporation to be organized for the purpose, if the plaintiff was ignorant of the matters complained of and had no notice to put him on inquiry until shortly before the filing of his bill, there can be no defence of laches, nor is it a defence that in such ignorance he accepted securities of the new corporation in satisfaction of his claim. *Dunning* v. *Bates*, 123.

Acquiescence.

It is no defence to suit for accounting that plaintiff in ignorance of matters complained of accepted securities in satisfaction of his claim, see *ante*, 6.

To prevent clouding of Title.

7. A landowner may maintain a suit in equity to prevent a threatened clouding of his title not yet accomplished. *Rogers* v. *Nichols*, 440.

Specific Performance.

8. A party to a contract of which time is of the essence who through his own fault fails in performance at the time appointed is not entitled to enforce a specific performance of the contract. *Garcin* v. *Pennsylvania Furnace Co.* 405.

To relieve against Forfeiture.

9. Equity will not relieve against the forfeiture of a deposit of money and stock upon the non-performance of a contract, where a fair interpretation of the contract shows the intention of the parties to be that the deposit shall be treated as liquidated damages in case of a failure to perform, and not as mere security for the performance of the contract. *Garcin* v. *Pennsylvania Furnace Co.* 405.

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Whether equity will relieve against loss of rights under insurance policy by failure to sue within time limited in policy where plaintiff has been prevented from bringing action by injunction issued after beginning of period limited, see INSURANCE, 7.

Equitable Mortgage.

10. If a creditor with the consent of his debtor takes on execution and also by a judgment on a writ of entry certain real estate of the debtor to hold as security for the debt, an equitable mortgage is created which will be enforced in equity as a trust. *Potter* v. *Kimball*, 120.
11. By R. L. c. 187, § 33, a suit, to redeem land from a deed absolute on its face but in fact given as security, can be maintained by the administrator of the estate of the grantor. In the phrase "If the owner of an equity of redemption dies" the words "owner of an equity of redemption" in the present statute, as well as the words "person, entitled to redeem any mortgaged estate" in the original act, include the grantor of an absolute deed intended as a mortgage. *Clark* v. *Seagraves*, 430.
12. In a suit in equity to redeem the plaintiff's interest in real and personal property held by the defendant under a deed absolute in form, the plaintiff can show that the deed was given as security for a debt due to a third person, the defendant's fraud in claiming an absolute title being the same whether the debt secured is due to the grantee or to another. *Ibid.*
13. An intestate, owning real and personal property, left at his death a son and a daughter, who were appointed to administer his estate. The son made conveyances absolute in form to his sister of his interest in the personal estate and in certain real estate of their father, and died. The administrator of the son's estate brought a bill in equity against the sister, as surviving administratrix of the estate of the father and also individually, alleging that the conveyances had been made merely as security for certain indebtedness of the plaintiff's intestate to his father's estate, and seeking to redeem. The defendant contended that the conveyances were made by her brother to her individually for her own benefit in the settlement of their father's estate. *Held*, that the plaintiff could maintain his bill without waiting for the Probate Court to decide whether the property belonged to the defendant individually or as administratrix, and that the fact, that all persons interested in the father's estate except creditors were parties to the suit and therefore the determination of the issues as to the personal property might be *res judicata* when the same questions afterwards were raised in the Probate Court, was accidental and immaterial. *Ibid.*
14. Under R. L. c. 187, § 33, a suit, to redeem land from a deed absolute on its face but in fact given as a mortgage, can be maintained by the administrator of the estate of the grantor without the plaintiff first obtaining a license to sell real estate. *Ibid.*
15. Where a suit is brought by an administrator under R. L. c. 187, § 33, to redeem land conveyed by his intestate by a deed absolute on its face but in fact given as a mortgage, if the plaintiff has obtained no license to sell, a decree in his favor enures to the benefit of the widow and heirs of the in-

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testate, and the defendant must be ordered to make a conveyance to the heirs, subject to the right of the widow to dower if a right of dower exists. *Clark* v. *Seagraves*, 430.

16. This court will entertain a bill under R. L. c. 187, § 33, to redeem land in another State from a deed absolute in form but intended as a mortgage, especially where the deed was made in this Commonwealth by one Massachusetts citizen to another. In such a suit by an administrator, if the plaintiff prevails, the defendant must be ordered to convey the land to those persons who are the heirs of the plaintiff's intestate by the laws of the State in which the land is situated, subject to rights of dower if existing. *Ibid.*

17. Although an equitable mortgagor who redeems must pay the whole debt, yet in a suit to redeem property transferred as security by several conveyances, if each conveyance was a separate transaction, the plaintiff has a right to redeem the property transferred by each conveyance on paying the debt which it was given to secure. *Ibid.*

18. In a suit to redeem from an equitable mortgage consisting of several conveyances absolute in form, the plaintiff to redeem must pay interest on the debt secured by each conveyance from the date when such conveyance was made and not merely from the date of filing his bill. *Ibid.*

19. A right to equitable relief founded on the failure of a person to perform duties arising from a fiduciary relation survives to an executor or administrator. The right to redeem property held under a deed absolute in form but intended as a mortgage is of this class. *Ibid.*

20. An agreement of a debtor with his creditor that in addition to other security named he will not "sell, dispose of or exchange in any way" his interest in a certain trade name without the consent in writing of the creditor is not an assignment and does not create an equitable mortgage. And the same is true of an agreement that the debtor so long as his indebtedness continues "will not assign, transfer, or sell" the trade name without the consent in writing of the creditor, and that if a certain note is not paid at maturity he will assign and transfer the trade name absolutely to any person named in a written demand of the creditor. *Crossman* v. *Griggs*, 275.

Statute of frauds is no defence to bill to establish equitable mortgage in real estate, see TRUST, 6.

Statute of limitations does not begin to run against equitable mortgagor until mortgagee repudiates trust, see LIMITATIONS, STATUTE OF, 1.

Quære, whether purchaser of piano at attempted sale under power in instrument creating neither mortgage nor pledge has rights enforceable in equity, see MORTGAGE, 3.

To enforce attempted Pledge.

21. An attempted pledge invalid for want of delivery cannot be enforced in equity. *Robertson* v. *Robertson*, 308.

22. In a suit in equity to enforce an alleged equitable pledge, it appeared, that the defendant's testator owed a certain sum of money to the plaintiff for which he gave the plaintiff a note and set aside as security for the note

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certain certificates of stock which he retained in his own possession and afterwards sold, that at his death an envelope was found in a trunk belonging to him containing two certificates of membership in cotton exchanges with a statement signed by him to the effect that these certificates were security in part for cash borrowed by him from the plaintiff, and had been so held since he had sold the shares of stock which previously had been the plaintiff's security. His estate was insolvent. *Held*, that, as it did not appear that the certificates of stock originally regarded as security ever were delivered to the plaintiff, there was no pledge on which to base an equitable claim to the certificates found in the trunk as having been substituted for a former security. *Robertson* v. *Robertson*, 308.

To enjoin Petition in Probate Court.

23. A trustee for a husband, under a fair and voluntary agreement by which the husband has placed a fund for the support of his wife in the hands of the trustee and the wife has agreed that she will not make any further claim on her husband for support, cannot maintain a bill in equity against the wife to enjoin her from proceeding with a petition for support in the Probate Court, as the husband has a complete and adequate remedy by setting up the contract in the Probate Court as a bar to the petition. *Bailey* v. *Dillon*, 244.

Survival of Right to Relief.

Right to relief founded on failure to perform duties arising from fiduciary relation survives to executor or administrator, see *ante*, 19.

EQUITY PLEADING AND PRACTICE.

Bill.

Question as to parties to be joined in bill for instructions not proper subject for prayer in such bill, see EQUITY JURISDICTION, 1.

Parties.

1. In a suit in equity for an accounting, by a bondholder for himself and other bondholders against trustees appointed by the bondholders to foreclose the mortgage securing the bonds and turn over the property to a new corporation to be organized for the purpose, alleging that such a corporation was formed but that the defendants failed to turn over to it a part of the proceeds of the property that came into their hands as trustees, and were guilty of negligence or misfeasance causing loss to the plaintiff, the new corporation is not a necessary party. HAMMOND & BRALEY, JJ. dissenting. *Dunning* v. *Bates*, 123.

Question as to parties to be joined in bill for instructions not proper subject for prayer in such bill, see EQUITY JURISDICTION, 1.

Appeal.

2. Under R. L. c. 159, § 19, an appeal from a final decree in equity stays all proceedings. *Crossman* v. *Griggs*, 275.

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Appeal by defendant from interlocutory decree for plaintiff makes it no less duty of court to vacate interlocutory decree when final decree dismissing bill is entered, see *post*, 12.

Costs.

3. Where a bill is dismissed with costs, a defendant who on his own petition has been admitted as a party erroneously is not entitled to costs. *Crossman* v. *Griggs*, 275.

Report of Facts under R. L. c. 159, § 23.

4. Where a suit in equity comes to this court by appeal from a final decree of the Superior Court, and the judge of the Superior Court makes a report of facts under R. L. c. 159, § 23, to complete the presentation of the questions of law raised, it is not proper for his report to end with a statement of terms of reservation such as would be appropriate in the conclusion of a report under § 29 of the same chapter. *Hildreth* v. *Thibodeau*, 83.

Master's Report.

5. The recommitting of a master's report is a matter of discretion not open to revision by this court. *Bakshian* v. *Hassanoff*, 255.
6. Where the evidence is not reported the findings of a master on matters of fact cannot be revised. *Ibid.*
7. Where a master's report does not state the evidence the correctness of his findings on matters of fact cannot be considered. *Bogigian* v. *Hassanoff*, 380.
8. Where the order appointing a master does not require him to report the evidence, and a motion for an order requiring him to do so is denied, if he reports all the facts on which he bases his findings for the purpose of presenting the questions raised and argued before him, it is open to this court to consider whether on his report a finding of the master which includes rulings of law can be sustained. *Fleming* v. *Cohen*, 323.
9. In a suit in equity for an accounting against an administratrix and against the same defendant individually, the defendant excepted to the refusal of a master to find that the suit could not be maintained because it was not apparent from the bill whether the plaintiff sought an accounting from the defendant in her individual or her representative capacity. *Held*, that such an exception does not lie, as it is the duty of a master to find the facts and not to pass on the question whether on those facts the plaintiff is entitled to a decree, still less to decide what such decree should be. *Clark* v. *Seagraves*, 430.

Decree.

10. A decree of the Superior Court, dismissing a bill in equity so far as it relates to the facts stated in a certain amendment, is final unless appealed from. *Krower* v. *Felz*, 391.
11. An unnecessary declaration in a statement of findings preceding a decree in equity, although on a matter not properly the subject of the decree, may not be so irregular as to call for an amendment. *City Missionary Society* v. *Memorial Church*, 531.

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12. In a suit in equity an interlocutory decree for the plaintiff appealed from by the defendant should be vacated in spite of the appeal when a final decree is entered dismissing the bill. *Crossman* v. *Griggs*, 275.

In suit by administrator to redeem land conveyed by intestate by deed absolute on its face but in fact given as mortgage, if plaintiff has obtained no license to sell, decree in his favor enures to benefit of widow and heirs of intestate, see EQUITY JURISDICTION, 15, 16.

Intervening Petition.

Where funds of corporation are in hands of receiver, creditor of creditor of corporation cannot intervene in receivership suit to reach and apply to his claim receiver's dividend to creditor of corporation, see EQUITY JURISDICTION, 4.

ERROR, WRIT OF.

Proper remedy of one sentenced to imprisonment for misdemeanor upon default when asking for trial, see HABEAS CORPUS, 1.

ESTATE TAIL.

1. In a will executed and proved before St. 1888, c. 273, now R. L. c. 134, § 5, a devise to a certain person and if he shall "die without issue" to the testator's heirs passes an estate tail. *Gilkie* v. *Marsh*, 336.

2. Under successive statutes since 1791, now R. L. c. 127, § 24, an entail can be barred by a deed in common form. *Ibid.*

ESTOPPEL.

Insurance company may be estopped to set up in defence to action on policy that action was not brought within time limited when within that time it has refused on another ground to pay insurance money, see INSURANCE, 5.

EVERETT.

The taking by the city of Everett under St. 1902, c. 465, of certain land in that city for a hospital for the treatment of contagious diseases is valid. *Manning* v. *Bruce*, 282.

St. 1902, c. 465, authorizing Everett to take land for hospital for treatment of contagious diseases is constitutional, see CONSTITUTIONAL LAW, 4.

EVIDENCE.

Presumption and Burden of Proof.

Unexplained absence of person unheard from for seven years raises presumption of his death, see ABSENTEE, 1.

No presumption that absentee unheard from for more than seven years and unmarried when he disappeared ever had issue, see ABSENTEE, 2.

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No presumption that lease was executed in duplicate, see *post*, 8.
Hospital erected by city for treatment of contagious diseases not presumed to be nuisance, see MUNICIPAL CORPORATIONS, 9.
Presumption that note is payment of debt may be rebutted by evidence of contrary intention, and fact that treating note as payment would deprive creditor of other security is such evidence, see BILLS AND NOTES, 3.
Where wall on line between two city lots has existed for sixty years and part of it has been treated as party wall by owners of both lots, it is presumed to be party wall in its entire length, see PARTY WALL, 1.
Presumption that crime committed by wife in presence of husband is crime of husband is not conclusive and may be rebutted even by evidence of her conduct in his presence, see HUSBAND AND WIFE, 1.
In action against railroad under R. L. c. 111, § 268, for death at grade crossing caused by failure to give required signals, if it appears that required signals were not given, plaintiff need only prove further that intestate was killed by train at crossing, and burden is on defendant to prove gross negligence of deceased, see RAILROAD, 1.

Relevancy and Materiality.

In action to recover money paid under contract for purchase of machine, evidence that machine is infringement of patent held by another is immaterial where plaintiff by using machine has lost right to reject it, see SALE, 3.
In action upon oral contract adopting terms of contract in writing between defendant and third person, oral statements of salesman of third person before written contract was made are inadmissible, see *post*, 1.

Competency.

1. In an action of contract, upon an oral agreement adopting the terms of a contract in writing between the defendant and a third person, the defendant cannot put in evidence oral statements of a salesman of the third person before the contract in writing between the third person and the defendant was made, for, even if such oral statements made before the contract was reduced to writing could be admitted as against the third person, they are both incompetent and immaterial against the plaintiff who is not suing on an assignment of the contract. *Am. Elec. Works* v. *N. E. Elec. R. R. Con. Co.* 546.
In action against city for unlawful exclusion from public school, plaintiff may testify to what was said by principal to superintendent of schools at interview which resulted in plaintiff's suspension, see SCHOOLS AND SCHOOL COMMITTEE, 1.
In action for deceit whereby plaintiff was induced to subscribe for shares in certain corporation, plaintiff to show worthlessness of shares may put in evidence record of suit in equity to foreclose mortgage made by corporation and for appointment of receiver, see DECEIT, 2.
On issue of value of land, evidence is admissible of particulars of purchase of land but not of alleged mistaken understanding of parties as to size of

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tract on which the sale was based, where no claim has been made by parties on account of alleged mistake, see *post*, 10.

Complainant under bastardy act can testify that defendant is father of child, as accusation of paternity under R. L. c. 82, § 16, to prove constancy in accusation, see BASTARDY.

Best and Secondary.

2. There is no error in the admission of secondary evidence of the contents of a document, which the party introducing the evidence has given the adverse party no notice to produce, where the document is not one which the adverse party would be expected to have in his possession and he does not show that he could have produced it if he had received notice to do so. *Cooley* v. *Collins*, 507.

3. In the absence of evidence on the subject there is no presumption that a lease was executed in duplicate, and, if there is evidence that a certain lease is in the custody of the lessee who is not within reach of the process of the court, a presiding judge may allow the introduction of secondary evidence as to the contents of the lease without the party introducing it calling for its production by the lessor, a deponent in the case, especially where the lessor has testified in his deposition that the instrument alleged to be a lease was merely an agreement that a former lessee might sublet to the alleged lessee. *Ibid.*

Hearsay.

4. At the trial of an action against a railroad company under R. L. c. 111, § 268, for causing the death of the plaintiff's intestate, a boy of seven and one half years of age, at a grade crossing, by a failure to give the signals required by law, a boy of about the same age who was coming home from school with the intestate when the accident happened, after testifying that he and the intestate did not run down a hill to see the train pass, testified that he told his father and mother about the occurrence and told them the truth about it that night. The defendant called the father and mother, who testified that their son told them that the plaintiff's intestate said "Let's run down and see the train go by," that they started on a run down the hill, that the intestate ran past him half way down the hill and got there before he did, and that he next saw him lying in the snow. *Held*, that the statement of the boy to his father and mother was not evidence of the truth of the things stated, being none the less hearsay because the boy testified that he told his father and mother the truth, and was competent only to impeach the boy's testimony by showing that he at other times had made statements inconsistent with his statement on the witness stand. *McDonald* v. *New York Central & Hudson River Railroad*, 474.

Collateral Issues: Remoteness.

5. In an action against a manufacturing corporation by a superintendent of its factory for alleged breach of contract in discharging the plaintiff, where the defendant contended that the discharge was justified because the plaintiff had neglected or wilfully failed to perform the duties for which he

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Evidence (continued).

was employed, there was evidence that the plaintiff while superintendent had full charge of the operation of the defendant's factory and that the factory was equipped sufficiently for properly furnishing the goods required in the defendant's business. The defendant offered to show that during a period of six months before the plaintiff's discharge there was a loss of about $20,000 in the business and that the general manager, from an investigation made on his return from Europe during the period in question, would testify that the cause of the loss was largely the result of not properly furnishing the goods for the business, and that it was traceable to the factory. The evidence was excluded. *Held*, that the exclusion was right, the plaintiff's neglect or wilful failure to perform his duties, if a fact, being susceptible of direct proof, and the loss or profit of a manufacturing company being dependent on so many conditions as to have no necessary bearing on the conduct of the superintendent. *Dunton* v. *Derby Desk Co.* 35.

In action for injuries from defective elevator, evidence of experts who examined it day after accident is admissible in absence of evidence of change in its condition between times of accident and of examination, see NEGLIGENCE, 25.

In action against city for overflow of sewer, evidence of overflow two years before held too remote to show notice that overflow was likely to happen, see MUNICIPAL CORPORATIONS, 3.

In action for injury to child while operating machine, he cannot show that other children of plaintiff's age previously had been injured in same manner while attempting to operate same machine, see NEGLIGENCE, 36.

On issue of damages to mill owner from taking of waters of brook used for power, evidence as to rate of interest at which money could be safely invested is too remote, see DAMAGES, 10.

On issue of damages to mill owner from taking of water of brook used for power, cost of substituting steam for water power in mill is not proper measure of damages, see DAMAGES, 3.

On issue of damages to mill owner from taking of waters of brook used for power, evidence of value of water in connection with reservoir below mill which receives part of its water from other sources is too remote, see DAMAGES, 4.

On issue of damages to mill owner in small town from taking of brook used for power, testimony as to value of power in certain city may be excluded in absence of evidence that value in town is same as in city, see DAMAGES, 11.

Opinion: Experts.

6. The opinion of one of large experience in stringing wires on poles and in moving and repairing such wires, if this is sufficient to qualify him as an expert, is not admissible to show the proper manner of moving a feed wire cable on the arm of a pole, or that a particular manner of doing this is improper, the process of stringing such a cable on the arms of poles erected to support it being so plain and simple, and so well within the scope of common observation and knowledge, as not to be a proper subject for expert testimony. *Meehan* v. *Holyoke Street Railway*, 511.

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7. *Semble*, that the opinion of one who has had an extended experience in the charge of passenger elevators, that a movable stool is not a safe article to put into a passenger elevator, is not competent evidence. *Gibson* v. *International Trust Co.* 454.

8. While a purely hypothetical question to an expert may be better in form, yet, if there is no dispute about the facts, a witness may be asked to state his opinion on the assumption that the evidence is true. *Burnside* v. *Everett*, 4.

9. In an action against a city for alleged negligence in improperly maintaining the gate at the end of an overflow pipe, so that after a heavy rainfall there was an overflow from a sewer through a connecting drain into the plaintiff's cellar, the defendant asked its engineer the following question: "Assuming the rainfall to be in the nature as testified to by Mr. S., and as former witnesses testified, and assuming the gate in the Metropolitan to be closed, if the tidal gate in the overflow was closed at that time, what, in your opinion, would happen to the system?" The witness answered that the sewer would overflow, as in his opinion it was not of sufficient capacity to carry off such an amount of rain water. There appeared to have been no conflicting evidence on the question of the nature of the rainfall. *Held*, that there was no error in allowing the question to be put to the engineer in this form. *Ibid.*

Where stock in corporation had no market value, treasurer of corporation allowed to give his opinion of its fair value, see *post*, 11.

On issue of damages to mill owner from taking of waters of brook used for power, judge may exclude opinion of witness founded on offer made for his mill lower down on same stream, see DAMAGES, 9.

On issue of damages to mill owner from taking of waters of brook used for power, mechanical engineer with no particular knowledge of values in neighborhood may not be allowed to give his opinion as to value per horse power of power at mill, but may give cost of producing power, see DAMAGES, 6.

On issue of damages to mill owner from taking of waters of brook used for power, expert in hydraulic engineering familiar with value of water and steam power but ignorant of value of real estate in vicinity and knowing of no sales of power alone may not be allowed to give his opinion on value of waters taken and as to damage to mill owner's property caused by taking of waters, see DAMAGES, 7.

Of Value of Real Estate.

10. On a petition for the assessment of damages for the taking of land by a board of park commissioners, the petitioner was allowed to show that he bought two undivided thirds of the land from his two brothers and to prove what was said when that trade was made, but was not allowed to show an understanding of his brothers and himself, not expressed, that the land contained a number of square feet less than it subsequently was found to contain, and that he bought the land for seventy-five cents a square foot although he paid less than that rate by the actual measurement. It appeared that five years had elapsed and that the brothers had made no claim

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Evidence (*continued*).

on the petitioner founded on the alleged mistake of fact. *Held*, that the exclusion was right. *White* v. *Boston*, 65.

On petition for damages for taking of land petitioner cannot put in evidence letter from himself written after taking or letter written before taking and sent after he knew of taking and intended letter to affect his claim, see *post*, 17.

Of Value of Stock of Corporation.

11. On the question of the value of the stock of a corporation, if there have been no sales of the stock and therefore there can be no possible evidence of ordinary market value, *semble*, that the treasurer of the corporation, who also is the president of another corporation owning shares of the stock, may be allowed to testify that in his opinion a fair market value of the stock would be its par value of $100 a share. *Aldrich* v. *Bay State Construction Co.* 489.

Record of suit in equity against corporation to foreclose mortgage and for appointment of receiver admissible to show worthlessness of its shares, see DECEIT, 2.

Of Value of Water Power.

On issue of value for power of waters of brook taken under statutory authority, evidence of cost of reproducing petitioner's dam and of special value of waters for washing and scouring is immaterial, see DAMAGES, 2.

On issue of damages to mill owner from taking of waters of brook used for power, cost of substitution of steam for water power in mill is not proper measure of damages, see DAMAGES, 3.

On issue of damages to mill owner from taking of waters of brook used for power, evidence of value of water in connection with reservoir below mill which receives part of its water from other sources is too remote, see DAMAGES, 4.

On issue of damages to mill owner from taking of waters of brook used for power, question as to average daily yield in horse power from watershed feeding brook incompetent where at times large amount of surplus water runs to waste, see DAMAGES, 5.

On issue of damages to mill owner from taking of waters of brook used for power, mechanical engineer with no particular knowledge of values in neighborhood, may not be allowed to give his opinion as to value per horse power of power at mill, but may give cost of producing power, see DAMAGES, 6.

On issue of damages to mill owner from taking of waters of brook used for power, expert in hydraulic engineering familiar with value of water and steam power but ignorant of value of real estate in vicinity and knowing of no sales of power alone may not be allowed to give his opinion on value of waters taken and as to damage to mill owner's property caused by taking of waters, see DAMAGES, 7.

On issue of damages to mill owner from taking of waters of brook used for power, best test is cost of producing power under most favorable conditions rather than under temporary conditions at mill, see DAMAGES, 8.

On issue of damages to mill owner from taking of waters of brook used for power, judge may exclude opinion of witness founded on offer made for his mill farther down the stream, see DAMAGES, 9.

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On issue of damages to mill owner in small town from taking of waters of brook used for power, testimony as to value of power in certain city may be excluded in absence of evidence that value in town is same as in city, see DAMAGES, 11.

On issue of damages to mill owner from taking of waters of brook used for power, evidence as to rate of interest at which money could be invested safely is too remote, see DAMAGES, 10.

Of Conversation by Telephone.

Where plaintiff testifies that he had conversation with defendant by telephone witness for plaintiff who heard and knows only what plaintiff said may testify to that, see *post*, 18.

Of Intent.

In action against city for unlawful exclusion from public schools, good faith of school committee in conducting hearing given to plaintiff before his permanent exclusion may be question of fact for jury, see SCHOOLS AND SCHOOL COMMITTEE, 2.

Law and Fact.

Where contract is made by oral offer accepted by letter, judge may construe letter with reference to circumstances which evidence tends to establish and leave to jury question of existence of such circumstances, see CONTRACT, 11.

Proof of Foreign Law.

12. Where a report from a judge of the Superior Court sitting in equity speaks of the "questions of law" raised, and reports a "finding" of the judge as to the law of Nova Scotia, the report submits to this court a question of fact as to the law of that province. In this case the question was to be decided upon the pleadings and an agreed statement of facts, by which it was stipulated that either party might refer to the reports of the Supreme Court of Nova Scotia, the reports of the Supreme Court of Canada, and the reports of any courts in England, as well as to any English text books on the subject in question, it being agreed that the law of Nova Scotia on that subject was the same as that of England. *McCurdy* v. *McCallum*, 464.

Extrinsic affecting Writings.

13. Evidence of a custom is not admissible to change the plain terms of a contract in writing. *Boruszweski* v. *Middlesex Mutual Assur. Co.* 589.

14. In an action for alleged breach of a contract in writing to employ the plaintiff as exclusive agent in a certain territory to sell "certain kinds of electric vehicles" manufactured by the defendant, it appeared that the plaintiff was to have a certain commission on vehicles and parts of vehicles sold by the defendant on orders procured by the plaintiff and that the defendant never sold anything on orders procured by the plaintiff. The plaintiff offered to prove that the "certain kinds of electric vehicles" mentioned in the contract were understood and agreed by the parties to be machines described in certain catalogues and circulars as of a certain speed and capacity. The judge excluded the evidence and ordered a verdict for

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the defendant. *Held*, that the exclusion was right, there being no ambiguity in the contract which did not contain the warranty sought to be imported into it by oral evidence. *Neale* v. *American Electric Vehicle Co.* 303.

In action on fire insurance policy plaintiff cannot vary contract by proving custom to waive under certain circumstances requirement of policy of sworn statement of loss, see INSURANCE, 2.

In action upon oral contract adopting terms of contract in writing between defendant and third person, oral statements of salesman of third person before written contract was made are inadmissible, see *ante*, 1.

To establish precatory trust under will, evidence is admissible that beneficiary eleven years before went to live with testatrix under agreement of testatrix to leave him her property, and that before her death she declared that her property was depreciating, see TRUST, 4, 5.

Admissions and Confessions.

15. On the trial of a criminal complaint in the Superior Court on appeal from a municipal court, the jury may be told that they may consider the fact that one branch of the defence introduced in the Superior Court was not presented at the trial in the court below, if they also are told that the defendant might have refrained on the ground of policy from putting in his defence or a part of it in the lower court, and that if he did so no inference can be drawn against him from his failure to put it in, and that unless the jury are satisfied that the defendant had the evidence in his possession at the time and would have put it in at the trial in the lower court if it had been true, no inference should be drawn against him for his failure to introduce it there. *Commonwealth* v. *Anselvich*, 376.

Fact that one hires tenement house does not make him custodian of roof of shed of adjoining tenement house belonging to same landlord nor make his conversations as to it admissible against landlord, see LANDLORD AND TENANT, 6.

Of Conduct of Accomplice.

16. On a trial for assault and robbery, where two defendants have been indicted jointly but only one is tried, there being evidence that the robbery occurred between half past eight and nine o'clock in the evening of a certain day, and that the absent defendant was an accomplice of the defendant on trial, a witness for the government may testify that the absent defendant lived in his house about two months, that he last saw him in his house between half past nine and ten o'clock on the evening of the robbery, that he was not alone, and that the voice of the person with him was that of the defendant on trial. *Commonwealth* v. *Kelly*, 403.

Self-serving Statements.

17. On a petition for the assessment of damages for a taking of land by a board of park commissioners, the petitioner cannot put in evidence letters from himself to the commissioners written after the land was taken, and it does not matter that one of the letters was written before the petitioner knew of the taking, if when he sent the letter he knew of the taking and intended the letter to affect his claim. *White* v. *Boston*, 65.

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18. A plaintiff having testified that he had a certain conversation with the defendant by telephone, a witness for the plaintiff may be allowed to testify what he heard the plaintiff say as a part of that conversation, although the witness had no personal knowledge that the plaintiff was talking with the defendant or that he was talking with any one. Whether the conversation testified to by the plaintiff took place as alleged or was fictitious is a question of fact for the jury. *McCarthy* v. *Peach*, 67.

To show defendant's liability as lessee, plaintiff may show that plaintiff's predecessor and plaintiff acted for defendant in collecting rent from others and treated defendant as tenant, but plaintiff cannot put in his account book to show to whom he credited rent collected, see LANDLORD AND TENANT, 1, 2.

Declarations of Deceased Persons.

To establish precatory trust under will evidence is admissible under R. L. c. 175, § 66, of declarations of testatrix as to value of her estate, that it was diminishing and that it would continue to diminish, see TRUST, 5.

In Rebuttal.

19. On a trial for assault and robbery, where the person robbed has testified that she recognized the defendant as the person who assaulted and robbed her, and the defendant contends and has introduced evidence to show that when the police officers called on the person robbed about half an hour after the robbery she did not mention the defendant's name, the government after the close of the defendant's evidence may recall the person robbed to testify in rebuttal that she told the officers it was the defendant that night, "right off, as soon as they came." *Commonwealth* v. *Kelly*, 403.

Admission of testimony in rebuttal is within discretion of presiding judge, see PRACTICE, CIVIL, 9.

EXECUTION.

Demand on trustee on execution in trustee process, under R. L. c. 189, § 40, must be made by officer and not by plaintiff personally, see TRUSTEE PROCESS.

EXECUTOR AND ADMINISTRATOR.

Accounts of.

1 An executor who also is trustee under the same will is liable as executor for assets in his hands until his account as executor has been filed and allowed in the Probate Court. *Downer* v. *Squire*, 189.

2. Ordinarily payments made by an executor for expenses of defending the estate from claims deemed to be unjust, of proving the will and of resisting an attack upon it by persons interested in preventing its allowance, are allowed in the executor's account as properly payable from the testator's personal estate. *Hampden Trust Co.* v. *Leary*, 577.

Where will is subject to trust deed which provides that trustee, also named as executor in will, may use income from trust property in defending estate against unjust claims and any attack on will, executor still may charge to estate expenses thus incurred, see TRUST, 7.

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What passes to.

3. One owning real and personal estate died intestate leaving a son and daughter. The son conveyed to his sister his interest in the personal estate and in certain real estate of their father to secure an indebtedness of the son to the estate of the father. The son died. His administrator brought a suit in equity against the daughter as administratrix of the father's estate and also individually, to redeem the son's interest in the property on payment of his indebtedness to the estate. *Held*, that although the conveyances of the son were in form to the defendant individually they were made for the benefit of the father's estate, and were assets of the estate for which it was the defendant's duty to account as administratrix; that the rents and profits of the real estate, which the plaintiff was entitled to redeem, which accrued before the death of the plaintiff's intestate, belonged to the plaintiff as administrator, and that the rents and profits after the death of the plaintiff's intestate belonged to the heirs of the intestate, but that as the administrator was redeeming in their interest he might deduct such rents and profits in paying the debt of the intestate to redeem the property; and that, as the personal property to be redeemed was the son's interest in the personal property of his father's estate, and as the plaintiff in order to redeem must pay his debt with interest so that the father's estate might be settled, the plaintiff in no event would be entitled to a credit by way of income derived from the personal property before such settlement. *Clark* v. *Seagraves*, 430.

Liabilities.

4. Where executors under the will of a testator who had been conducting a mercantile and manufacturing business on borrowed capital, not being authorized by the will to carry on the business, but carrying it on by agreement of all parties interested for the purpose of preserving the business as a going concern, in good faith borrow money from the mother of one of the executors to use in the business, the son under authority from the other executors signing the note in the name under which the testator conducted the business, by himself "as executor", and the money is used in discharging debts of the business, and later the executors sell the business to a purchaser who agrees to assume and pay all debts incurred by the executors in carrying on the business, the lender can maintain a suit in equity to recover the amount of the loan from the purchaser, the executors being liable for this indebtedness as money lent or money had and received, if they are not liable on the note. *Howe* v. *Richardson*, 259.

Acting as Trustee.

5. Where the effect of the provisions of a will is to subject property in the hands of an executor to certain trusts, and no trustee is named, the executor on qualifying as such holds the property as trustee. *Bean* v. *Commonwealth*, 348.

6. An executor, who as such under the terms of a will holds property in trust for his own benefit during a certain term with authority at the end of the term, or sooner at his discretion, to sell the property and distribute

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the proceeds among himself and others, takes as executor a fee in the real estate thus held. *Bean* v. *Commonwealth*, 348.

7. The owner of a wharf property, with sheds and buildings thereon, who carried on a coal, hay and grain business there, died leaving eight children, and by his will appointed his daughter C. executrix, and directed and authorized her as executrix to carry on his business for five years, or for any shorter term she might deem best, at the risk of his estate for her own benefit, she paying personally for repairs, insurance and taxes, and directed that at the end of the five years she should sell the business and the land and buildings and distribute what then remained of his real and personal estate equally among all his children. The testator's daughter C. qualified as executrix. She was not named as trustee in the will and was not so appointed by the Probate Court. While she was carrying on the business under the terms of the will, the land and buildings were taken by the metropolitan park commissioners under St. 1893, c. 407. On a petition by C. as executrix and by her and the other children of the testator individually for damages under that act, it was *held*, that the property vested in C. as trustee by virtue of her appointment as executrix, and that holding the property in fee she as executrix alone could prosecute the petition for damages. *Ibid.*

Suits by and against.

Suit to redeem land from deed absolute on its face but really given as mortgage can be maintained by administrator of grantor without first obtaining license to sell real estate, see EQUITY JURISDICTION, 14.

In suit by administrator to redeem land conveyed by intestate by deed absolute on its face but in fact given as mortgage, if plaintiff has obtained no license to sell, decree in his favor enures to benefit of widow and heirs of intestate, see EQUITY JURISDICTION, 15, 16.

Administrator cannot bring writ of entry to recover land which he alleges he is licensed to sell when appeal has been taken from decree granting license and exceptions to order confirming decree are pending before full court, see REAL ACTION.

FACTOR.

In an action by a manufacturer against the assignee for the benefit of the creditors of a factor who had become insolvent, to recover a balance alleged to be due for amounts received by the factor in payment for the plaintiff's goods consigned to him for sale, it appeared, that by the course of dealing between the plaintiff and the factor the factor sold the plaintiff's goods, consigned to him, for cash or on credit to such customers as he pleased without disclosing the name of his principal, and credited the plaintiff with the amount of the purchase money whether it then had been received or not, guaranteeing the sales and receiving a commission for doing so, that when the factor made remittances to the plaintiff from time to time they were credited generally without reference to any particular consignment, that with quarterly statements and adjustments of interest

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the account ran on continuously from month to month and year to year, and that during the entire period up to the time of the factor's insolvency the factor was indebted largely to the plaintiff on the whole account as would have appeared if a balance of the whole account had been struck at any time. The defendant contended that he was entitled to retain the balance claimed by the plaintiff because it represented a sum which the factor had paid to the plaintiff in excess of the amount which the factor's books showed to be due to the plaintiff at a certain date, and the defendant claimed the right to retain the proceeds of the sales made during a period of about three weeks and a half from that date, on the ground that the payments made by the factor to the plaintiff should be appropriated to the sales made by the factor in the order in which they were made, and that this would leave the balance in question as the property of the factor, so that the plaintiff could claim the amount only as a general creditor of the factor. *Held*, that the payments by the factor should be applied on the open running account in accordance with the course of dealing between the parties, and as the balance on the general account was at all times against the factor the money retained by the defendant belonged to the plaintiff. *Cushman* v. *Snow*, 169.

FRAUD.

As against Creditors.

Where a husband through a third person conveys to his wife in trust certain real estate which is substantially all of his property, both husband and wife knowing that the husband is insolvent, and the effect of the conveyance is to put the property beyond the reach of the grantor's creditors, the transaction however free from moral turpitude is fraudulent as against creditors. *Matthews* v. *Thompson*, 14.

Where husband conveys through third person to wife and wife without consideration releases dower, if conveyance is set aside as fraudulent wife regains dower, see DOWER, 2.

For conveyance to corporation in fraud of creditors, see EQUITY JURISDICTION, 3.

Fraud as great in insisting upon benefit of absolute conveyance intended to secure debt to another as when intended to secure debt due to grantee, see EQUITY JURISDICTION, 12.

FRAUDS, STATUTE OF.

Sale of Goods, Wares or Merchandise.

1. Whether a mortgage of personal property is a contract for the sale of goods, wares or merchandise within the meaning of the statute of frauds, *quære*. *Bogigian* v. *Hassanoff*, 380.

2. A contract between one who has advanced money, taking as security a storage receipt for certain goods and later a bill of sale of the goods, and

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the owner of the goods, by which it is agreed that the goods shall be sold by the combined efforts of the parties, on the terms and conditions agreed upon, and the proceeds applied to reimbursing and compensating the lender of the money, the balance to go to the owner of the goods, is not a contract for the sale of goods, wares or merchandise within the meaning of the statute of frauds. *Bogigian* v. *Hassanoff*, 380.

3. Two partners dissolving a partnership, with only two bonds as assets and with no debts except for the purchase money for the two bonds, which had been advanced by one of the partners, orally agreed that each partner should take one of the bonds at its cost price, the partner who had advanced the purchase money agreeing to carry the bond of the other partner for a week or two to enable him to sell it or raise the money to pay for it. On his failing for several months to do either, he who had advanced the money sold the bond at public auction after notice to his former partner, and, the price realized being less than the firm paid for it, sued his former partner for the difference. *Held*, that this was not a contract of sale within the statute of frauds, and that the plaintiff should have judgment. *Mason* v. *Spiller*, 346.

Interest in Real Estate.

Statute is no defence to bill to establish oral trust by showing that defendant holds real estate as security, see TRUST, 6.

Representation concerning Credit of Another.

4. The provision of R. L. c. 74, § 4, requiring a writing signed by the party to be charged, to charge a person upon a representation "concerning the character, conduct, credit, ability, trade or dealings of any other person," applies only to representations made to induce the plaintiff to enter into a transaction which will result in a debt due to the plaintiff from the third person. *Walker* v. *Russell*, 69.

GIFT.

Donatio Causa Mortis.

1. A promissory note of the donor cannot be made the subject of a *donatio causa mortis*. *Mason* v. *Gardner*, 515.

Where woman in contemplation of surgical operation placed bank books in hands of friend "in trust" for son, and survived operation more than two years leaving books still in hands of friend, transaction was held to create trust and not to be *donatio causa mortis*, see TRUST, 1.

Inter Vivos.

2. Whether one having a deposit in a savings bank, who signs an order directing the bank to pay the deposit and the dividends thereon to a certain person, makes a gift of the deposit to the person named, or whether he merely gives the order to enable the other person to draw money for him as a matter of convenience, is a question of fact depending on the intent of the assignor. *Williams* v. *Moulton*, 402.

3. A person under obligation to W. declared that he intended to give her a

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certain savings bank book, having previously declared his intention of leaving her something, and when about to make his will sent for the savings bank book and gave directions to his lawyer, which were not intended to pass the property immediately either as a *donatio causa mortis* or as a gift *inter vivos* to the lawyer in trust for W., but to provide for giving the property to W. by his will. He was to complete his will on the following day, but died the next morning. *Held*, that W. could not maintain a suit in equity against the administrator of the deceased for the possession of the savings bank book or the money represented by it. *Weatherbee* v. *Litchfield*, 399.

GOOD WILL.

Quære, whether debtor's interest in good will of business can be reached in suit of equitable attachment under R. L. c. 159, § 3, cl. 7, see EQUITY JURISDICTION, 2.

GRADE CROSSING ACTS.

St. 1896, c. 321, authorized commissioners, previously appointed, to prescribe the manner in which certain grade crossings shall be abolished, and "to consider whether public necessity and convenience require any additional land to be taken for railroad and highway purposes in connection with the abolition of such crossings, and if so to prescribe the limits within which the same may be taken" and further provided that the acceptance of the supplemental report of the commissioners "shall be a taking of the land required to be taken for railroad and highway purposes, as therein specified." *Held*, that this gave the Superior Court authority in accepting the report of the commissioners to take the additional land required for the erection of a passenger station outside of the location of the railroad as designated in the report. *Lancy* v. *Boston*, 128.

St. 1896, c. 321, authorizing commissioners appointed under St. 1890, c. 428, for alteration of certain grade crossing to prescribe changes in other grade crossings, is constitutional, see CONSTITUTIONAL LAW, 8.

GUARANTY.

Under a guaranty in writing by which the guarantor agrees to be responsible to the promisee for the price of goods sold by him to a certain other person to an amount named, and expressly waives notice of the sale of any goods under the guaranty and also waives any demand on the purchaser for payment, the guarantor is liable on his promise without notice of the purchaser's failure to pay for goods sold to him under the guaranty. *Sands* v. *Melchionda*, 270.

HABEAS CORPUS.

1. Under R. L. c. 191, § 1, cl. 2, one who has been sentenced to imprisonment for a misdemeanor upon a default when asking for a trial, is not entitled to prosecute a writ of *habeas corpus*, his remedy being by writ of error if his restraint is illegal. *Sellers' case*, 301.

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2. Where proceedings on a petition for a writ of *habeas corpus* are adjourned into the full court by the order of a single justice, and the facts although uncontroverted are not agreed in writing, they must be brought before the full court by a report of the single justice. *Sellers' case*, 301.

HUSBAND AND WIFE.

1. The presumption that a crime committed by the act of a married woman in the presence of her husband is the crime of the husband and not of the wife is not conclusive, and evidence of the woman's conduct even in her husband's presence may be sufficient alone to rebut it. *Commonwealth* v. *Adams*, 101.
2. A fair and voluntary contract between a wife and a trustee in behalf of her husband, under which the husband places in the hands of the trustee a fund for the support of his wife and the wife agrees that she will not make any further claim on her husband for support, is not void as against public policy. *Bailey* v. *Dillon*, 244.
3. Where a husband is seeking to enforce in equity a fair and voluntary agreement of his wife to accept a fund placed in the hands of a trustee for her separate maintenance and not to make any further claim on him for support, what would be the effect of the proof of a *bona fide* offer to return on the part of the wife, *quære*. *Ibid.*

Trustee for husband cannot obtain injunction against proceedings by wife for support in Probate Court in violation of her valid contract to make no claim for support, as such contract may be set up in defence in Probate Court, see EQUITY JURISDICTION, 23.

Conveyance by husband through third person to wife may be fraudulent as against creditors although free from moral turpitude, see FRAUD.

Quære, whether woman who has obtained decree of divorce and an execution for alimony, but has made no attachment and has not levied execution, is creditor of her former husband, see PRACTICE, CIVIL, 7.

INSOLVENCY.

Proof of Claim.

Where banker advances money to merchant for importation of goods consigned to banker who is to retain the title until he sells the goods in his own name, banker may prove claim in insolvency after selling the goods as owner and need not comply with requirements of Pub. Sts. c. 157, § 28, as to proof of claim by creditor having mortgage or pledge, see SALE, 1.

INSURANCE.

Fire.

Sworn statement of loss.

1. In an action on a fire insurance policy in the Massachusetts standard form, it appeared, that the defendant's adjuster went to the town where the fire had occurred, saw the broker who procured the insurance, and asked for information about the loss. He refused to look at the place

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where the fire occurred or to go to the broker's office, where he was told there was a "proof of loss," and left the town, saying to the broker on leaving that he would see him or communicate with him again in a short time. *Held*, that there was no evidence that the defendant had waived the requirement of a sworn statement of loss. *Boruszweski* v. *Middlesex Mutual Assur. Co.* 589.

2. In an action on a fire insurance policy in the Massachusetts standard form, where the defence is a failure of the plaintiff to render to the company a sworn statement of loss as required by the policy, the plaintiff cannot vary the contract by proving a custom under which a failure of the company, upon notice that a fire has occurred, to send to the insured a blank form for the sworn statement of loss, or to send an adjuster to make an adjustment of the loss on the ground carrying with him such a blank form, is a waiver of the requirement in the policy of a sworn statement of loss, under which custom the company would be liable for the amount of the policy, without regard to the damage done by the fire, in sixty days after a mere informal notice that a fire has occurred instead of being liable for the amount adjusted according to the terms of the policy only in sixty days after the sworn statement has been rendered to the company. *Ibid.*

Under bill of sale of all assets of corporation, insurance policies held not to be included in round price but seller credited with pro rata value of existing policies, see SALE, 8.

Life.

Construction.

3. A policy of life insurance payable to the wife and daughter of the insured, "or if they are not living to the executors, administrators or assigns" of the insured, is payable to the representative of the estate of the insured only on the contingency that both the wife and daughter are dead, and there is no implication that if one of the two is not living one half of the insurance money is payable to the executor or administrator of the insured, the wife and daughter of the insured both having vested interests in the policy before the death of the insured, whether their interests are joint with the incident of survivorship or in common, which in this case it was not necessary to decide. *Fish* v. *Massachusetts Mutual Life Ins. Co.* 358.

Limitation of time for bringing action.

4. It is no excuse for a failure to sue on a policy, insuring against death by accident, within the time limited in the policy that the plaintiff did not know of that provision in the policy. *Paul* v. *Fidelity & Casualty Co.* 413.

5. A foreign insurance company insuring against death by accident does not waive the defence of a limitation requiring an action on the policy to be brought within six months from the death of the insured, by refusing on another ground to pay the insurance money after the expiration of the six months, even if such a refusal before the expiration of the six months might estop it from setting up the limitation if the beneficiary was prejudiced or misled by the statement. *Ibid.*

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6. It is not the duty of a foreign insurance company insuring against death by accident to call the attention of the beneficiary of a policy, under which a liability has accrued, to a provision contained in it that an action on the policy must be begun within six months from the death of the insured, and the company does not waive the defence of a failure to comply with this limitation by its counsel taking part in interviews and making communications relating to the policy without referring to the limitation. *Paul* v. *Fidelity & Casualty Co.* 413.

7. A provision in a foreign insurance policy insuring against death by accident, that no action shall be brought on it unless begun within six months from the death of the insured, is binding on the beneficiary to whom the policy is payable, although she was prevented by an injunction issued after the six months had begun to run from bringing her action within the time limited, and she cannot maintain an action at law on the policy, especially where a final decree dissolved the injunction before the six months expired and there was a short but sufficient time in which an action could be brought. Whether equity would grant relief from the forfeiture incurred by the failure to bring an action within the time limited in the policy was not considered. *Ibid.*

Accident.

Insurance against death by accident, see *ante*, 4–7.

INTEREST.

Plaintiff redeeming from equitable mortgage made by several conveyances absolute in form must pay interest on debt secured by each conveyance from date of conveyance, see EQUITY JURISDICTION, 18.

JOINT TENANTS AND TENANTS IN COMMON.

Bequest "in two parts" to two churches to be equally divided between them held to create tenancy in common, see CHARITY, 4.

JURISDICTION.

1. On a bill in equity against a resident of another State the court has no jurisdiction to proceed against the defendant *in personam* if the only service upon him has been by the delivery to him in the State in which he resides of a copy of the bill and an order of notice. *Hildreth* v. *Thibodeau*, 83.

2. A patent right granted by the United States recorded in the name of a citizen of another State has no *situs* in this Commonwealth on which to found jurisdiction of a suit in equity to obtain possession and control of the patent, where no jurisdiction *in personam* has been acquired over the owner of record. *Ibid.*

Petition for partition may be filed in Superior Court after dismissal of peti-

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tion in Probate Court at request of petitioners without prejudice and without appeal, see PARTITION, 1.

JURY AND JURORS.

Under the laws of this Commonwealth one who at some previous time has been convicted of felony can be placed on the jury list as a person of good moral character, although under R. L. c. 176, § 5, his name may be removed by the revisory board in their discretion, unless he has been pardoned on the ground of innocence. *Commonwealth* v. *Wong Chung*, 231.

Quære whether penalty imposed by U. S. St. 1865, c. 79, § 21, on one found guilty of desertion disqualifies him as juror, see DESERTER, 2.

Granting of new trial in criminal case on account of disability of juror not known to defendant until after his conviction is within discretion of judge, see PRACTICE, CRIMINAL, 2.

LANDLORD AND TENANT.

Existence of Relation.

1. Where, in an action on a covenant in a lease for rent, the defendant denies liability on the ground that the plaintiff and his predecessor in title accepted other persons as tenants in place of the defendant and collected rent from such other persons, the plaintiff may show that the plaintiff's predecessor and the plaintiff in collecting rent from such other persons acted for the defendant and continued to treat the defendant as tenant of the premises liable for the rent. *Cooley* v. *Collins*, 507.

2. In an action for rent, where the defendant contends that the plaintiff accepted another person as tenant in his place, and the plaintiff contends that he still held the defendant liable as tenant and in collecting rent from the other person acted as the defendant's agent, the plaintiff cannot put in evidence his own account book to show to whom he credited the rent collected. *Ibid.*

3. While a lease to A. and B. was in force the lessor made a new lease to A. alone, for a longer term at an increased rent. In the new lease was a stipulation that all rents received on account of the first lease should be credited as part payment under the new lease. *Held*, that, even if the second lease operated as a grant of the reversion, the lessor reserved the right to the rent payable under the first lease and the obligation of A. and B. thereunder remained intact. *Shea* v. *McCauliff*, 569.

4. A. and B. were partners and as such held a lease. A. sold his interest in the partnership assets to B. and took from him a bond to save him harmless from any debts or liabilities of the late firm. While B. was in possession of the leased premises paying rent to the lessor, the lessor made a new lease to A alone, for a longer term at an increased rent, with a stipulation that all rents received on account of the first lease should be credited as part payments under the second lease. After the execution of the new lease B. paid no rent to the lessor but paid rent to A. upon bills presented

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in A.'s name, and no demand for payment was made except by A. Later, before the expiration of the first lease, B. after notice to A. vacated the premises and refused to pay further rent. A. paid his rent under the new lease, and at the expiration of the term of the first lease sued B. on his bond for the amount of rent paid by A. which was due under the old lease from the time B. vacated the premises until the end of the term. A judge, sitting without a jury, found for the plaintiff. *Held*, that the finding was justified; that the second lease, whether a grant of the reversion or not, reserved the rent under the first lease, and, this being so, the judge might have found that A. in collecting the rent from B. in his own name in reality was acting as the agent of the lessor, and that in paying the rent under the second lease, after the default of B., A. was paying a debt of the late firm in discharging its obligations to the lessor under the first lease, which made B. liable on his bond. *Shea* v. *McCauliff*, 569.

Liability of Landlord.

5. If a woman owning a tenement house with a shed, the roof of which is flat with a railing around it and is used by the tenants, also owns an adjoining shed with a pitched roof having a skylight but no railing, and tells the tenants not to allow their children in the street, and that if they want air the roofs are there for them, and says that the mother of certain children has nothing else to do but to sit on the roofs and mind them, and if this can be construed as an invitation to any one to allow children to go on the roofs unattended, it amounts to no more than a license, and the house owner making the statements is not liable to a child six and a half years old, an inmate of the tenement house, injured by falling through the skylight of the pitched roof of the adjoining shed when going over to see if a little boy is coming out to play with her. *McCoy* v. *Walsh*, 369.

Agency for Landlord.

6. In an action by a child for injuries from falling through a skylight in the roof of a shed belonging to the defendant, adjoining the roof of a shed of a tenement house belonging to the defendant of which the plaintiff is an inmate, if it appears that the plaintiff lives with her mother in a room of the tenement house hired from a Mrs. K. who has leased the whole house from the defendant, this does not make Mrs. K. the custodian of the roof of the shed of the defendant through the skylight of which the plaintiff has fallen, and conversations of a witness with Mrs. K. tending to show where children were allowed to play are not admissible against the defendant. *McCoy* v. *Walsh*, 369.

Eviction.

7. When the lessee under a lease in writing rightfully removes the goods of a tenant at sufferance he has the right to put them off the premises, but he has no right to remove the goods to a storehouse at his own expense to be held there for safe keeping subject to the order of the owner, if the owner is present and objects to this. *McGonigle* v. *Belleisle Co.* 310.

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LIBEL AND SLANDER.

Publication.

1. Although sending a libellous letter by mail to the person libelled with no reason to suppose that it will be opened and read by anybody else before he has received it is not a publication which will support a civil action for libel, yet if the sender of the letter has good reason to believe that it is likely to be opened by an authorized person other than the person libelled, and this happens, the mailing is a publication. *Rumney* v. *Worthley*, 144.
2. In an action for libel, it appeared, that the defendant wrote a libellous letter addressed on a business envelope to the plaintiff at the plaintiff's dwelling house and that the letter was opened and read by the plaintiff's daughter in a grocery adjoining the dwelling house kept by the plaintiff's wife who had filed a certificate that she was doing business as a married woman, that the plaintiff conducted the business as her agent and that his daughter was a clerk in the grocery and opened and read the plaintiff's business letters, that the defendant had come to the grocery a great many times for the purpose of selling goods and that during the year before the receipt of the letter he had seen the daughter at least two or three times receive mail addressed to her father and open it in his presence, and that he had seen her after opening the letters walk with them to her father and show him their contents. *Held*, that there was evidence of publication of the libel. *Ibid.*

LICENSE.

Certain remarks made by owner of tenement house if they could be construed as invitation to allow children to go on roofs of sheds unattended held to amount to no more than license, see LANDLORD AND TENANT, 5.

City cannot require railroad company to procure license before digging up highway to repair gates at grade crossing, see RAILROAD, 3, 4.

LIMITATION.

By Contract.

It is no excuse for failure to sue on life insurance policy within time limited in policy, that plaintiff did not know of that provision, see INSURANCE, 4.

Whether equity will relieve against loss of rights under insurance policy by failure to sue within time limited in policy where plaintiff was prevented from bringing action by injunction issued after beginning of period limited, see INSURANCE, 7.

LIMITATIONS, STATUTE OF.

1. Where one holds real estate by an absolute legal title subject to an oral trust which makes him in equity a mortgagee, the statute of limitations does not begin to run against the equitable mortgagor until the equitable mortgagee repudiates the trust. *Potter* v. *Kimball*, 120.

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2. A trustee gave a bond to the beneficiaries interested in a certain sum of money received in trust by him, with the condition, that in the event of his ceasing to hold the sum as trustee by reason of death or otherwise his executors or administrators should pay the sum with all income therefrom then due to such person as the beneficiaries or the Probate Court should designate "to receive said sum", and in the meantime the trustee should pay to the beneficiary for life, a net income of at least five per cent per annum on the fund. On the same day the trustee and the beneficiaries executed an agreement in writing that the trustee instead of investing the fund should lend it to a firm consisting of himself and the sureties on his bond. The trustee died and executors under his will were appointed, filed bonds and gave notice of their appointment. Seven years thereafter a new trustee was appointed to hold the fund, and in three months made a demand for the fund on the executors of the first trustee. Within a year from the appointment of the new trustee the beneficiaries of the trust brought an action against the executors of the first trustee on the bond of their testator. Before this action was brought the new trustee had petitioned the Probate Court for an order to the executors of the first trustee to retain sufficient property in their hands to satisfy the claim, and that court made the order, the accounts of the executors not having been settled. *Held*, that the action of the beneficiaries against the executors was not barred by the special statute of limitations because there was no default on the bond until demand was made for the money after the appointment of the new trustee; *also*, that the petition for the retention of assets was presented seasonably, and being for the same claim it did not matter that it was presented by the new trustee instead of by the plaintiffs; *also*, that the agreement permitting the first trustee to use the trust fund in his business did not terminate his liability as trustee, except so far as it was changed by the agreement; *also*, that the action was not barred by the general statute of limitations, for, although no demand was made until more than six years after it could have been made, the action was brought within twenty years from the execution of the bond; *also*, that it was no bar to the action that the accounts of the first trustee were not fully settled when it was brought, as the bond was not a general one to secure the faithful discharge of the trust, but was given to secure the payment of a specified sum of money. *Downer* v. *Squire*, 189.

Substitution of one defendant for another may be allowed by amendment although statute of limitations has run in favor of new defendant unless amendment is allowed, see PRACTICE, CIVIL, 5.

Provision of St. 1867, c. 308, that bill in equity to recover damages must be filed within one year of time of taking of land by city of Boston, is binding on minor residing outside of Commonwealth and having no knowledge of taking until year has expired, see DAMAGES, 1.

MARRIAGE.

1. If a man against whom a decree for divorce has been obtained under Pub. Sts. c. 146, making it illegal for him to marry again within two

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years from the entry of the final decree, marries within that period a woman who marries him in good faith in the full belief that his former marriage has been annulled by divorce, and the parties continue living together as husband and wife in good faith on the part of the wife until the impediment is removed by the expiration of the two years, their marriage becomes valid under St. 1895, c. 427, and a third marriage by the husband while the second wife is living is polygamous. *Commonwealth* v. *Josselyn*, 186.

2. Under St. 1895, c. 427, making valid certain marriages where the parties continue to live together after the removal of an impediment, which applies to cases where at the time of the marriage ceremony "a former husband or wife of one of the parties was living, and the former marriage with such person was still in force", the words "in force" include a case where the former marriage although annulled for all other purposes by a final decree of divorce under Pub. Sts. c. 146, was in force under § 22 of that chapter for the purpose of making illegal a marriage of the husband within two years from the time of the entry of the final decree. *Ibid.*

3. St. 1895, c. 427, making valid certain marriages where the parties continue to live together after the removal of an impediment, applies to a case where a final decree of divorce against the husband under Pub. Sts. c. 146, entered before the passage of the act made it illegal for him to marry again within two years from the entry of the decree and he having done so the impediment was removed by the expiration of the two years after the enactment of the statute; and so applied the statute is constitutional. Following Lufkin *v.* Lufkin, 182 Mass. 476. *Ibid.*

MASTER AND SERVANT.

A brakeman and a flagman at a railroad crossing are not acting in the course of their employment when tossing a signal torpedo back and forth and afterwards leaving it on the crossing, where it is found by a boy who cracks it open and is injured. *Obertoni* v. *Boston & Maine Railroad*, 481.

For other cases on this subject, see NEGLIGENCE, 29–40.

MILL AND MILL PRIVILEGE.

1. The mill act, now incorporated in R. L. c. 196, is constitutional. *Otis Co.* v. *Ludlow Manuf. Co.* 89.

2. The interference with the use of neighboring property by an appropriation of a mill site under the mill act, now incorporated in R. L. c. 196, is not a taking of property under the right of eminent domain. *Ibid.*

3. The purchase of certain land on a watercourse, which is subject to an agreement running with the land restricting the height to which a dam can be maintained, does not affect the right of the purchaser as the owner of other land two miles farther down on the same stream to construct a dam under the mill act in connection with this other land. Therefore in this case the court did not find it necessary to decide whether the contract

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in question was attached to the land to which it related or whether it was merely a personal contract of a former owner. *Otis Co.* v. *Ludlow Manuf. Co.* 89.

4. Under the mill act, Pub. Sts. c. 190, § 2, (R. L. c. 196, § 2,) a riparian owner, who begins a dam but does not finish it until a dam begun later by another riparian proprietor has been completed, if he completes and operates his dam within a reasonable time, has established the priority of appropriation required by the act which gives him a better right than the owner of the dam begun later and finished first, and his protection under the act is the same whether the other dam begun later is above his on the stream or below. *Ibid.*

MORTGAGE.

Of Real Estate.

1. If the holder of a note, secured by a second mortgage on land, purchases the land at a foreclosure sale under the first mortgage and the mortgagor releases the land to him as purchaser, and thereupon he makes a new first mortgage to the original first mortgagee, and if the proceeds of the foreclosure sale after paying the first mortgage and other charges when applied toward the payment of the note which was secured by the second mortgage leave a balance still due, the holder may recover this balance in an action on the note, as the extinguishment of the second mortgage has not extinguished the debt. *Sullivan* v. *Neary*, 158.

Of Chattels.

2. A mortgage of furniture in a boarding house of twenty-three rooms carried on by a husband and wife, including furniture which had belonged to the wife before they kept the boarding house and was in seven or eight rooms used for living purposes by the husband and wife and their family, includes "household furniture", within the meaning of St. 1892, c. 428, § 3, (R. L. c. 102, § 53,) and if the mortgage is at a greater rate of interest than eighteen per cent per annum and does not comply with the requirements of that statute it is wholly void. *Whether* in such a case the furniture in the rooms used by the boarders is "household furniture" within the meaning of the statute above cited as it would be for the purpose of exemption from taxation to the amount of $1,000 under R. L. c. 12, § 5, cl. 11, *quære*. *Gludden* v. *Nason*, 140.

3. In an action of replevin for a piano, it appeared, that the defendant, being the owner of the piano, signed a paper promising to pay E. a certain sum of money with interest at a rate named "for one year from date, and having pledged with said E. as security for payment my piano [described] and I give said E. full power to sell said piano at public or private sale at any time after one year, giving three weeks' notice and applying proceeds of sale for payment of note accounting to me for surplus, if any." E. recorded this instrument in the office of the town clerk. The piano never was delivered to E. but remained in the possession of the defendant. More than a year after the date of the instrument, the defendant having

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made default, E. after giving three weeks' notice sold the piano at private sale to the plaintiff. *Held*, that there was no mortgage because the instrument signed by the defendant contained no words of grant or sale and the recording was of no effect, nor was the transaction a pledge because there was no delivery; therefore that the exercise of the power of sale on default could transfer no title or right of possession and the action could not be maintained. *Whether* the attempted sale operated as an assignment of equitable rights and the plaintiff could by amendment change his action at law into a suit in equity to enforce the agreement of the defendant, or whether if there was a remedy in equity it must be enforced by E. to whom the promise was made, *quære*. *Harding* v. *Eldridge*, 39.

Quære, whether mortgage of personal property is contract for sale of goods, wares or merchandise within statute of frauds, see FRAUDS, STATUTE OF, 1.

Equitable.

Statute of frauds is no defence to bill to establish equitable mortgage in real estate, see TRUST, 6.

Statute of limitations does not begin to run against equitable mortgagor until mortgagee repudiates trust, see LIMITATIONS, STATUTE OF, 1.

Quære, whether purchaser of piano at attempted sale under power in instrument creating neither mortgage nor pledge has rights enforceable in equity, see *ante*, 3.

If creditor with consent of debtor takes on execution and by judgment on writ of entry real estate of debtor to hold as security for debt, equitable mortgage is created, see EQUITY JURISDICTION, 10.

Agreement of debtor that he will not dispose of trade name except under certain conditions and that if certain note is not paid he will assign trade name as creditor demands is not equitable mortgage, see EQUITY JURISDICTION, 20.

Concerning rights of administrator bringing suit to redeem land from deed absolute on its face but in fact given as mortgage, see EQUITY JURISDICTION, 11-19.

MUNICIPAL CORPORATIONS.

By-laws and Ordinances.

Ordinance of city requiring railroad company to procure license before digging up highway to repair gates at grade crossing would be void, see RAILROAD, 3, 4.

Officers.

Where judgment has been recovered against city for injuries from defect in highway caused by contractor acting for Commonwealth, and Commonwealth employed city solicitor, who had right to engage in business outside his work for city, to defend action in which judgment was recovered, fee paid city solicitor cannot be included in claim of Commonwealth after having paid judgment to subrogation to rights of city against contractor, see SUBROGATION, 2.

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Notice under R. L. c. 81, § 32, by town demanding from another town removal of pauper, may be signed by only one of overseers of poor if others authorize or ratify his action, see PAUPER, 3.

Overseers of poor of town can make answer to demand of another town for removal of pauper and therefore can waive right of town to object to notice for insufficiency, see PAUPER, 5.

Powers.

City has power without special legislation to erect hospital for treatment of contagious diseases on land purchased for purpose, see *post*, 8.

Liabilities.

Snow and ice thrown from municipal building.

1. A city is not liable for an injury caused by snow and ice negligently thrown from the roof of its city hall by men employed by its superintendent of public buildings, if the whole building is used and occupied for municipal purposes, although portions of the building are used by the water, sewer and other departments. *Kelley* v. *Boston*, 165.

Duty to remove unauthorized filling.

2. If the metropolitan park commissioners by a mistake unlawfully fill in an old archway under a highway thus stopping the flow of a branch of a river, and the city maintaining the highway, assuming that it has a right to place solid construction across this branch of the river, adopts the filling put there by the park commissioners and completes the street upon it, it becomes the duty of the city to remove the filling from the archway and construct the necessary culvert. *Commonwealth* v. *Newton*, 286.

Sewerage system.

3. In an action against a city for alleged negligence in improperly maintaining the gate at the end of an overflow pipe, so that after a heavy rainfall there was an overflow from a sewer through a connecting drain into the plaintiff's cellar, the plaintiff offered to prove that there had been an overflow two years before the one in question with the same system of sewerage, for the purpose of showing notice to the defendant that such an accident was likely to happen. The presiding judge excluded the evidence. *Held*, that the exclusion of this evidence as too remote was within the discretion of the presiding judge. *Burnside* v. *Everett*, 4.

4. Before the enactment of St. 1886, c. 331, it was not the duty of the city of Worcester to establish an independent system of sewage purification, which would require the taking of lands and the expenditure of large sums of money, necessary to purify the sewage discharged into the Blackstone River through Mill Brook under authority of St. 1867, c. 106, and, therefore, in an action against that city for injury to the plaintiff's land and mill pond, the fact that sewage in the water of Blackstone River caused the plaintiff's damage, coupled with the fact that the city made no attempt to purify its sewage before discharging it into the river, is not evidence of negligence on the part of the city before the enactment of St. 1886, c. 331. *Harrington* v. *Worcester*, 594.

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5. St. 1886, c. 331, establishing a system of sewage disposal for the city of Worcester, imposes a public duty on that city in the interest of the general public, looking particularly to the protection of the health of the people living near the Blackstone River, and does not give that city privileges for its own benefit as did St. 1867, c. 106. Therefore the city is not liable to one whose land and mill pond are injured by a negligent failure of the city properly to perform the duty imposed upon it by the first named statute. *Harrington* v. *Worcester*, 594.

6. The rule, that a city or town is not liable in tort for damage caused by its diverting water from a highway upon neighboring land in the performance of its duty to keep the highway convenient for travel, does not apply to damage caused by negligence in the construction of a conduit built to drain a large body of land principally owned by private persons, under a statute giving a city power to lay and construct works for the drainage of lands outside of streets. *Westcott* v. *Boston*, 540.

7. Whether a city constructing a conduit under statutory authority is negligent, in building the upper end of the conduit first and leaving it open and unconnected for a year and several months, during which time in very unusual conditions of weather the water flowing from it damages certain land below, is a question of fact and not of law. In such a case it is for a jury to say, whether the weather conditions which caused the damage reasonably were to be expected and reasonably could have been guarded against and whether under all the circumstances leaving the upper section of the conduit open for so long a period was negligence. *Ibid.*

Remedy given against city by statute for injuries to land from construction of sewerage works authorized by statute construed not to take away landowner's rights in tort for injuries from negligence in such construction, see STATUTE, 1.

Question to engineer assuming certain evidence to be true as to effect of closing of tidal gate on overflow of sewer held properly admitted, see EVIDENCE, 9.

Highways.

Duty of city or town as to repair of highways, see WAY, 4.

Liability of city or town for injury from defect in highway, see WAY, 5–11.

City cannot require railroad company to procure license before digging up highway to repair gates at grade crossing, and ordinance requiring license to dig up streets cannot be construed to apply to such case, see RAILROAD, 3, 4.

Hospital.

8. In this Commonwealth a city has authority without special legislation to erect a hospital for the treatment of contagious diseases on land purchased for the purpose. *Manning* v. *Bruce*, 282.

9. A hospital erected by a city for the treatment of contagious diseases is by R. L. c. 75, § 40, under the supervision of the board of health, and in the absence of proof will not be presumed to be a nuisance public or private. *Ibid.*

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Taking by Everett under St. 1902, c. 465, of certain land for hospital for treatment of contagious diseases is valid, see EVERETT.

NEGLIGENCE.

Contributory Negligence and Due Care.

1. An employee of an ice company, managing the switch of an ice run so carelessly that it is struck and broken by a block of ice and injures him by coming against his ankle, cannot recover from his employer for the injuries. *Cartier* v. *Walker Ice Co.* 523.

2. A junk dealer, who leaving his team in the road enters the premises of another person and picking up a rope from the ground is bitten in the calf of the leg by a watch dog, can be found not to have been in the exercise of due care although he did not intend to steal the rope. *Spellman* v. *Dyer*, 176.

3. If the sidewalk and street in front of a building in process of construction are obstructed as far as the tracks of a street railway but the tracks and the other side of the street are open for travel, and if between the rails of the track next to the obstruction there is an unguarded deep trench filled with soft mud as high as the level of the street and looking like the rest of the street when wet and muddy, a woman, who seeking to pass along the street is forced to go around the obstruction and thinking that she is taking the best and nearest way, after looking down and ahead to see where she best can walk, seeing no barrier and hearing no warning, steps into the mudhole and is injured, can be found to be in the exercise of due care both in relation to the city maintaining the highway and to a railway company maintaining the tracks which by statute is bound to keep the surface of the portions of the street occupied by its tracks in repair. *Hyde* v. *Boston*, 115.

As to due care of one walking around temporary structure in street and stepping in front of electric car, see *post*, 14.

Near-sighted man riding bicycle at night without slackening speed across bridge which he has had opportunity of knowing to be unguarded by rail is not necessarily negligent, see WAY, 6.

Of one leaving moving train aided by brakeman, see *post*, 11.

Of railroad mail clerk leaving by end door mail car built without end platforms, see *post*, 12.

Whether freight brakeman, running forward at night to make coupling and striking against end of one of pair of gates at railroad crossing improperly projecting out of line, is negligent, is question for jury, see *post*, 9.

Of passenger in electric car standing with thumb against jamb of doorway in slot in which door slides, see *post*, 15.

Whether one injured while trying to get on street car moving slowly was in exercise of due care, is question of fact for jury, see *post*, 13.

Of one who driving across street railway tracks looking in only one direction is struck by car coming from opposite direction, see *post*, 17.

Of workman walking unnecessarily under defective hoisting apparatus, see *post*, 31.

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Of workman working where he is likely to be struck by falling rivets after he has complained to superintendent of danger and has been assured of protection, is question for jury, see *post*, 33.

Where two workmen were hurt by fall of freight elevator on which they were standing after it had failed to respond to operating cord, and one knew that machinery was running and other did not, former held negligent and latter not, see *post*, 27.

Imputed.

Of person in rowboat injured by collision contributed to by negligence of another whom he permitted to have charge of boat, see *post*, 22.

Owner of goods transported in wagon cannot recover from street railway company for injury to goods by collision with car, if driver of wagon was negligent, see *post*, 20.

Proximate Cause.

4. One who negligently allows a pair of horses to run away can be found to be none the less liable for injury done by them, or if he is a servant his master to be none the less liable, because before doing the injury the horses swerved from their course when one of them was hit on the head with a rake by a person trying to stop them. Such an intervening act can be found to be a natural and probable consequence of letting the horses run away. *Turner* v. *Page*, 600.

Where operator of elevator starts it causing accident by grasping lever when falling back in trying to sit on stool which has been moved without his knowledge, grasping of lever and not presence of stool is proximate cause of accident, see *post*, 24.

Res Ipsa Loquitur.

5. The fact that a railroad signal torpedo is found on the planking of a railroad crossing does not in itself warrant the inference that it was left there by the servants of the railroad company in the course of their employment, and is not evidence of negligence on the part of the railroad company in an action brought against it by a boy eight years old, who found the torpedo on the crossing and was injured while cracking it with a rock. *Obertoni* v. *Boston & Maine Railroad*, 481.

6. In an action against a street railway company for an injury received by a passenger in a car of the defendant from a collision with another car of the defendant moving in an opposite direction on the same track, no exception lies to the refusal of the presiding judge to rule that the mere fact of the collision is not evidence of negligence, if there is the additional fact that the defendant offered in evidence no explanation of the collision. *Savage* v. *Marlborough Street Railway*, 203.

7. The fact that in a department store a medicine chest falls from a shelf two and a half feet wide with a slant of two or three inches at the end from which it falls, other chests on the same shelf remainimg in place and it having been the practice when the chests were taken off to show to customers to put them back if not sold, is not sufficient in itself to constitute evidence of negligence. To make it such evidence the plaintiff must show

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that causes other than the inclination of the shelf which might have produced the accident did not operate. *Hofnauer* v. *R. H. White Co.* 47.

In action for personal injuries resulting from fall of staging shown to have been caused by moving of upright and knocking away of braces, doctrine of *res ipsa loquitur* does not apply, as cause of fall of staging has been shown, see *post*, 28.

On Railroad.

8. A freight brakeman running forward at night to make a coupling does not assume the risk of striking against the end of one of a pair of gates at a railroad crossing, if the accident is due to the gates being constructed improperly or out of repair so that the ends do not meet when the gates are lowered, and this is shown to be an unusual and unexpected condition. *Fearns* v. *New York Central, etc. Railroad*, 529.

9. Whether a freight brakeman, running forward at night to make a coupling and striking against the end of one of a pair of gates at a railroad crossing improperly projecting out of line, is in the exercise of due care, is a question for the jury. *Ibid.*

10. If it is a fault on the part of a railroad company, that none of its servants helped in putting two children and a bag into a car of a train, when no request to do so was made by the mother of the children having them in charge, such fault is too remote to make the company liable for an injury to the woman while stepping from the train when it was in motion after putting the children and the bag on board. *Flaherty* v. *Boston & Maine Railroad*, 567.

11. If a woman, who enters a car of a railroad train, not as a passenger, but to help her two children and to place in the car a bag to go with them, attempts to leave the train after it has started and is injured, she cannot recover from the railroad company on the ground that a brakeman, when she found the gate of the platform closed, beckoned her to the next platform, saying as he helped her down the steps "It is all right, not going very fast; be careful." If this can be found to be negligence on the part of the railroad company, the circumstances which make it negligence also make the woman's own act contributory negligence. *Ibid.*

12. In an action by a railroad mail clerk against a railroad company for injuries from being squeezed between two mail cars while attempting to alight at a station of the defendant, it appeared, that the mail cars were built without the usual outside end platforms and had no platform gates, that the plaintiff had been a railroad mail clerk for ten years on the same route and for a year and a half in cars of the same type, that on each side of the mail cars were side doors with grab irons and iron stirrups, the end doors being designed for passing from the mail cars to the ordinary cars, and that the plaintiff in leaving the train by the narrow opening between the two mail cars was compelled to force his body through a space only thirteen or fourteen inches wide between two upright planks, knowing that this space was likely to be narrowed at any instant to a width of only two or five inches, when the cars should be brought forcibly together upon the changing of engines customary at this station. *Held*, that, assuming that

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the plaintiff was a passenger, and assuming also, without deciding it, that the absence of end platforms and platform gates on a postal car is a violation of R. L. c. 111, § 214, and thus was evidence of negligence on the part of the defendant, the plaintiff's attempt to leave the train by forcing his body through the narrow space between the planks at a time when it was to be expected that the cars would be brought nearer together in the process of changing engines was negligence on the part of the plaintiff contributing to his injuries. *Rice* v. *New York Central, etc. Railroad*, 521.

Fact that railroad signal torpedo is found on planking of railroad crossing is not in itself evidence of negligence of railroad company, see *ante*, 5.

On Street Railway.

13. Whether a person injured while trying to get on a street car moving slowly was in the exercise of due care, is a question of fact for the jury. *Block* v. *Worcester*, 526.

14. One who in the middle of the day is walking on a narrow plank walk extending along a temporary structure built out into a city street in front of a building in process of construction, and, to pass a man on the plank, steps directly in front of an electric car approaching from the opposite direction, which he could not have failed to see if he had looked, cannot be found to have been in the exercise of due care. *Itzkowitz* v. *Boston Elevated Railway*, 142.

15. If a passenger standing in an electric car, who has started to get out but finds that his stopping place has not been reached, puts his hand against the jamb of the doorway of the car with his thumb in the slot in which the door slides, to support himself against a sudden starting of the car, and the conductor, standing on the platform facing the passenger with his face not more than twelve inches from him and nearly opposite the passenger's hand, slams the door on the passenger's thumb and injures it, there is evidence warranting a finding of due care on the part of the passenger and of negligence on the part of the railway company. *Carroll* v. *Boston & Northern Street Railway*, 97.

16. If the motorman of an electric car, coming around a bend in the road at a rate of speed not more than five or six miles an hour, sees a horse and wagon on the track at a point from two hundred and fifty to three hundred feet distant, and applying the brakes slackens the speed of the car and avoids a collision, but the horse being frightened plunges in front of the car and runs across the street into a telephone pole, injuring himself and the driver and demolishing the wagon, there is nothing to show negligence on the part of the motorman. *O'Brien* v. *Blue Hill Street Railway*, 446.

Fact of collision between two cars on street railway evidence of negligence in connection with additional fact that defendant offered in evidence no explanation of collision, see *ante*, 6.

Where there is evidence that neither conductor nor motorman of electric car saw plaintiff's signal to stop, and that plaintiff while trying to board car fell into excavation between tracks, negligence of railway company may be question for jury, see WAY, 11.

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On Highway.

One approaching and intending to board street car on highway is not passenger on car before he reaches it and company owes him only duty which it owes all persons lawfully on street, see STREET RAILWAY, 1.

As to due care of one walking around temporary structure in street and falling into mudhole between tracks of street railway company, or stepping in front of approaching electric car, see *ante*, 3, 14.

In driving.

17. One who driving from an intersecting street approaches a street on which he knows that electric cars run in both directions and looking only in one direction is struck by a car coming from the other direction is not in the exercise of due care. *Dunn* v. *Old Colony Street Railway*, 316.

18. A declaration, alleging that the plaintiff was injured when "crossing the junction" of two streets named, may be supported by evidence that the plaintiff was injured when he had been standing for two or three seconds on the sidewalk at the corner of the two streets looking across one of them. *Drew* v. *Farnsworth*, 365.

19. One driving a two horse furniture team at the rate of five or six miles an hour in an empty street, so near a sidewalk that the hub of the wheel extending over the sidewalk hits a boy standing about a foot and a half inside of the curbstone in a place of apparent safety, can be found to be negligent, and his master to be liable to the boy for injuries thus caused if the boy is in the exercise of due care. *Ibid.*

20. The owner of furniture being transported in a wagon cannot recover from a street railway company for injury to the furniture by a collision with a car of the railway company if the driver of the wagon was not in the exercise of due care. *Dunn* v. *Old Colony Street Railway*, 316.

21. A driver of horses attached to a tip cart, who leaves them standing near a railroad crossing where a switching engine is shifting back and forth while he goes back to pick up a part of his load which has fallen from the cart, may be found to be negligent if the horses run away and cause injury, although the horses never had run away before and many times had been left unhitched and had been much about railroads and were accustomed to the sights and sounds about trains, and although the driver had no knowledge of any tendency on the part of the horses to run away, and did what it was customary to do under similar circumstances. *Turner* v. *Page*, 600.

One who negligently allowed horses to run away may be found to be liable for injury done by them although person trying to stop them made them swerve from their course by hitting one with rake, see *ante*, 4.

On Plank Runway.

As to injury to one wheeling barrow on rickety plank runway, see *post*, 32.

In rowing.

22. If a person in a rowboat permits another person to do all the rowing and have charge of the boat, he cannot recover from the proprietor of a

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steamboat for an injury caused by a collision with the steamboat to which the negligence of the rower contributes, especially where there is no negligence on the part of those in charge of the steamboat. *Yarnold* v. *Bowers*, 396.

In Shop.

No evidence of negligence in maintaining shelf in shop from which chest fell on plaintiff, that shelf slanted two or three inches at one end and that three months before similar chest had fallen from same place, see *ante*, 7, *post*, 34.

Injury on Pole supporting Wires.

Process of stringing cable on arms of poles so simple as not to be proper subject for expert testimony, see EVIDENCE, 6.

As to injury to lineman assisting in stringing cable on pole caused by slipping of cable from pins on pole and going off arm carrying him with it, see *post*, 30, 35.

In Factory.

As to injury from power press for cutting out wire gauze, see *post*, 29, 36.

As to injury caused by set screw on revolving shaft, a device no longer common, see *post*, 39.

In operating and maintaining Elevator.

23. *Semble*, that it is no evidence of negligence on the part of one maintaining a passenger elevator to permit a movable stool to remain in the elevator for the use of the operator. *Gibson* v. *International Trust Co.* 454.

Whether movable stool is safe article to put into passenger elevator is not proper subject for expert testimony, see EVIDENCE, 7.

24. In an action for personal injuries from the starting of an elevator while the plaintiff was alighting, caused by the operator of the elevator grasping the lever when falling back in trying to sit down on a stool which had been moved without his knowing it, the question whether it is evidence of negligence to permit a movable stool to remain in a passenger elevator is not material, as the grasping of the lever and not the presence of the stool was the proximate cause of the accident. *Gibson* v. *International Trust Co.* 454.

25. In an action by a workman in an iron foundry against his employer for injuries from the fall of a freight elevator on which he was standing, after the plaintiff has shown that the clutches of the elevator were defective and practically useless, he may show by the testimony of experts, who made an examination of the elevator the day after its fall, that there were defects in the car and in the uprights, and that either the car would not have fallen had the clutches been in working order, or that one of the uprights was sprung so that the clutches could not catch on it, there being nothing to show that any change had occurred between the time of the accident and the examination of the elevator by the experts. *Droney* v. *Doherty*, 205.

26. It is evidence of a failure in duty on the part of the proprietor of an iron foundry maintaining a freight elevator on which his workmen ascended and descended in going up with loads of iron to the furnace and

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returning for other loads, that the elevator car with workmen on it fell, either because the clutches of the elevator were out of order and failed to work or because the posts on which it ran were out of repair. *Droney* v. *Doherty*, 205.

27. In actions by two workmen in an iron foundry against their employer for injuries from the fall of a freight elevator, it appeared, that the plaintiffs had taken up a load of iron to the furnace and stepped on the elevator car to descend. On pulling the operating cord in the usual way the car instead of descending remained stationary. One of the men, experienced in operating the elevator although he was ignorant of the method by which the power was applied, stepped off to ascertain whether the operating machinery was running and, finding that it was, went back to the car. As he stepped upon its floor it fell. The second man had remained in the car and did not know that the machinery was running until the first man told him so on his return, the announcement being practically simultaneous with the fall of the car. *Held*, that the plaintiff who stepped off the car and returned to it incurred the danger voluntarily and could not recover, but that the plaintiff who remained in the car could be found to have been in the exercise of due care. *Ibid.*

Injuries to Employee of Another from fall of Staging.

28. In an action by an employee of a corporation engaged in putting elevator cars into certain elevator wells against another corporation engaged at the same time in putting iron panels on the outside of the wells, for injuries caused by a temporary staging constructed by the servants of the defendant falling on the plaintiff as he stepped out of one of the elevator wells in the course of his work while the servants of the defendant were engaged in shifting the staging from one place to another, it appeared, that the fall of the staging was caused by a certain upright having been moved out and certain braces knocked away, but it did not appear whether this was done by the plaintiff or a fellow workman of the plaintiff employed by the same corporation or whether it was done by the servants of the defendant or by some third person. Everybody concerned denied having done it. *Held*, that, the cause of the fall of the staging having been shown, the doctrine of *res ipsa loquitur* did not apply; *also*, that it was right to instruct the jury that the defendant was bound to exercise due care in shifting the staging, including the discovery of its condition; *also*, that it was right to instruct the jury, that if they found that the upright was moved out and the braces knocked away by the plaintiff's fellow servant they must be satisfied, in order to find the defendant liable, that the defendant's employees would have learned the condition of the upright if they had exercised due care and also that they were negligent in handling the staging as they did knowing that the braces were gone. *Parsons* v. *Hecla Iron Works*, 221.

Employer's Liability.

Assumption of risk.

29. A boy fourteen years of age who has had the ends of two fingers cut off by a power press for cutting out wire gauze, which he had been operating

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for two days before the day of the accident, if he testifies, that he fully understood the operation of the machine, and that the superintendent warned him to look out for his fingers, and if, when the continued operation of the machine caused the muscles of his right leg to become numb and his eyes to become strained, he continued to work without mentioning these facts, cannot recover from his employer for the injury of which he assumed the risk. *Cohen* v. *Hamblin & Russell Manuf. Co.* 544.

30. A lineman who has been employed in stringing a feed wire cable on poles for more than two weeks, during which time three miles of the cable have been strung, if injured while at work in moving the cable from one pin to another on the arm of a pole from the cable slipping off the arm and carrying him with it, there being nothing to show that the method adopted in moving the wire differed from that previously adopted in stringing the other poles, cannot hold his employer liable for injuries thus caused on the ground that the method was an improper one, as ordinary care would have given the lineman knowledge of the danger incidental to the process, so that he must be presumed to have appreciated it and by continuing to work to have accepted the risk. *Meehan* v. *Holyoke Street Railway*, 511.

31. If a workman assisting in hoisting loads of lumber in a building in process of construction, who has been told by the foreman in charge always to keep from under the load and never to go under it, is called to the floor above while a load is being hoisted to assist in unloading it, and on his way to the ladder leading to the floor above unnecessarily passes under the load, the ladder being otherwise accessible, and is injured by the falling of the load upon him owing to the breaking of the hook of the hoisting chain, he either is not in the exercise of due care or voluntarily assumes the risk of injury, and if his injuries result in death, his administrator cannot recover against his employer. *Slade* v. *Beattie*, 267.

32. In an action by a night watchman and fireman against his employer for injuries from a fall caused by the canting over of a plank runway up which the plaintiff was wheeling ashes in an iron barrow, it appeared, that the plaintiff had been in the defendant's employment as night watchman and fireman for about twelve years, that for about a month before the accident the runway had been warped and twisted and the plaintiff had been accustomed to trig up with a wooden wedge one of the corners of the runway resting on the floor, that when the wedge was in the plank was firm but that it was rickety without it, that three or four days before the accident the plaintiff told the defendant's superintendent that the plank was warped or "rockety" and that it was not fit to wheel on, and the superintendent said that he would see to it. The plaintiff testified that he supposed the wedge was in when he started up the plank because he "generally looked every barrel." *Held*, that the plaintiff could not recover, as he fully knew the condition of the runway and assumed the risk, and there was nothing to show that his continuing to work was induced by any statement of the superintendent. *Daily* v. *Fiberloid Co.* 318.

33. If a workman is set at work picking up rivets from the ground between

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two circular concentric iron shells of a gasometer in process of construction while men are at work on stagings above him riveting in place the iron plates that are to form the shells, and if this workman goes to a superintendent, tells him that the work is dangerous and that he does not care to get injured, and asks him if he will not let him do the work at night or on Sunday, and the superintendent says that that cannot be as he wants the rivets to use immediately and says "You go back to work and I will take care of you", and if the workman going back to work in the course of a few minutes is struck on the head by a falling object and injured, the superintendent in the meantime having given no directions and done nothing for the workman's protection, the workman, in an action against his employer constructing the gasometer, has a right to go to the jury on the questions of his due care, his assumption of the risk and the negligence of the superintendent. *McKinnon* v. *Riter-Conley Manuf. Co.* 155.

34. In an action for personal injuries by a saleswoman employed in the department store of the defendant, it appeared, that it was part of the plaintiff's duty to sell medicine chests, that these chests were kept on a shelf two feet and a half wide, sixty feet long and six and one half feet from the floor, supported by posts twelve feet apart and extending about three feet beyond the last post, that there was a perceptible slant of two or three inches at the end of the shelf, that while the plaintiff in the performance of her duties was standing near this end, one of the chests fell and striking her caused the injuries, and that about three months before a similar chest had fallen from the same part of the shelf. It further appeared that during the employment of the plaintiff and when the first chest fell a person was present whose duty it was to tell the saleswoman what to do "if there was anything out of order around the place," and to give directions from time to time, but who was not intrusted with the duty of constructing or repairing the shelves. *Held*, that there was no evidence of the defendant's negligence in maintaining the shelf; *also*, that the condition of the shelf was obvious and if it involved a danger the risk was assumed by the plaintiff; *also*, that there was no evidence of any negligence on the part of the person in charge. *Hofnauer* v. *R. H. White Co.* 47.

Freight brakeman running forward at night to make coupling does not assume risk of striking against end of one of pair of gates at railroad crossing improperly out of line, see *ante*, 8.

Duty to warn.

35. It is not the duty of a street railway company, employing a lineman to assist in stringing a feed wire cable on its poles, to instruct or warn him that while he is grasping the cable in adjusting it on the arm of a pole it may slip from the pins intended to hold it and go off the arm carrying him with it. *Meehan* v. *Holyoke Street Railway*, 511.

Evidence of other similar accidents.

36. In an action, by a boy fourteen years of age when injured, for the cutting off of the ends of two of his fingers by a power press for cutting out wire gauze, which he was operating, the plaintiff cannot be permitted to show, that in previous attempts to operate the machine by children of the

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age of the plaintiff the other children had been caught in the same manner as the plaintiff. *Cohen* v. *Hamblin & Russell Manuf. Co.* 544.

Superintendence.

87. The act of one of two house painters, in attempting to hold the foot of a ladder while the other is upon it and negligently letting it slip, is not an act of superintendence but of simple manual labor, even if the painter guilty of the negligence is otherwise a superintendent within the meaning of the employers' liability act. *Hoffman* v. *Holt*, 572.

88. If a superintendent directing the demolition of a boiler house goes to dinner, leaving the men whom he has employed for the work engaged upon it according to a safe method prescribed by him, and in his absence three of the men devise a speedier way of demolishing the building by means of a heavy iron pipe used as a battering ram and applying this method knock out a brick pier supporting one corner of the building, causing the whole building to fall suddenly and to injure two of the workmen who had nothing to do with the adoption or use of the battering ram, there is no evidence to support an action by the injured workmen against the superintendent for negligence. *Beatty* v. *Weed*, 99.

Negligence of superintendent ordering man to work where he is likely to be struck by rivets falling, and taking no measures for his protection, see *ante*, 33.

Where chest fell on saleswoman from shelf in shop, no negligence shown on part of person in charge not intrusted with duty of constructing or repairing shelves, see *ante*, 34.

Statement by superintendent that he would see to warped runway held not evidence to show that he induced plaintiff to use it, see *ante*, 32.

Exposure to danger from well-known device no longer common.

89. If a foreman in a shoe factory accustomed to machinery is sent to clear and fit for occupancy an additional room recently hired by the proprietor of the factory and understands that the machinery there is not new, and if, after working off and on in this room for ten days, his sleeve is caught by a set screw in a revolving shaft while he is doing some whitewashing near it, he cannot recover from his employer for injuries thus caused, there being no negligence on the part of the employer in exposing him to a danger so well understood and apparent, even if set screws are no longer a common device and their use in other establishments has ceased. *Archibald* v. *Cygolf Shoe Co.* 213.

Negligence of fellow servant.

40. The proprietor of a foundry is not liable at common law to an employee for the loss of an eye hit by a chip of metal flying from the head of a cutter, if the cutter was selected by a fellow servant, and the employer furnished proper and suitable cutters in sufficient numbers for the work. *Needham* v. *Stone*, 565.

Ways, works or machinery.

Liability for injury from fall of freight elevator caused by defective clutches or uprights, see *ante*, 25-27.

Employee managing switch of ice run so carelessly that it is struck by block

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of ice and injures him by coming against his ankle, cannot recover from employer, see *ante*, 1.

As to negligence of bank in failing to return draft at once on non-payment at maturity as instructed, see BILLS AND NOTES, 5, 6.

Whether city is negligent in building upper end of conduit first, leaving it open for over a year and causing overflow on land below in unusual conditions of weather, is question for jury, see MUNICIPAL CORPORATIONS, 7.

NEW TRIAL.

See PRACTICE, CIVIL, 23, 24; PRACTICE, CRIMINAL, 2.

NUISANCE.

Hospital erected by city for treatment of contagious diseases is not presumed to be nuisance, see MUNICIPAL CORPORATIONS, 9.

OPTION.

Where defendant offered to pay for material in stock of either of two companies at plaintiff's option, and plaintiff replied that he would take stock in either one or the other, naming both, option held to be in plaintiff, see CONTRACT, 14.

ORDER.

Whether order by depositor in savings bank to pay deposit to another is gift or merely authority to enable payee to draw money for depositor, depends on intent of depositor, see GIFT, 2.

PARTIES.

Misjoinder of defendant in action at law not good ground of demurrer for another defendant, see PRACTICE, CIVIL, 26.

PARTITION.

1. Under Pub. Sts. c. 178, § 64, (R. L. c. 184, § 46,) providing that when proceedings for partition are lawfully commenced in either the Probate Court or the Superior Court "the court in which they are so commenced shall retain jurisdiction of the case, saving the right of appeal in all cases where an appeal is allowed by law", if a petition for partition in the Probate Court is dismissed without prejudice at the request of the petitioners and no appeal is taken within the time required by law, the petitioners have a right to file a new petition in the Superior Court. *McCarty* v. *Patterson*, 1.

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Partition (*continued*).

2. On a petition for partition of real estate belonging to the heirs of an estate not yet settled there is no occasion for the appointment of a receiver. Whether in such a case the court has power to appoint a receiver even with the assent of all the parties, *quære*. *McCarty* v. *Patterson*, 1.
3. On a petition for partition the right of the petitioners to have a partition made is not affected by an error of the trial judge in appointing a receiver without power to do so, nor by the fact that there are attachments upon the shares of some of the petitioners. *Ibid.*

PARTNERSHIP.

Where A. and B. are partners holding under a lease and A. sells out his interest in partnership assets to B., taking from B. bond to save him harmless from debts of partnership, and A. takes new lease of premises from lessor for longer term, and B. before termination of new lease vacates, refusing to pay rent, A. in paying rent under second lease after default of B. and before expiration of first lease may be found to be discharging partnership liability under first lease, rendering B. liable on bond, see LANDLORD AND TENANT, 4.

Where only assets on dissolution of partnership are two bonds of which each of two partners agrees to take one, and one partner who had advanced purchase price for both agrees to carry bond of other partner for him but on his failure to pay as agreed sells bond at auction for less than purchase price, he may recover balance, the transaction not being contract of sale within statute of frauds, see FRAUDS, STATUTE OF, 3.

PARTY WALL.

1. Where a wall dividing two city lots and standing four inches on each has existed for sixty years and a part of it has been treated as a party wall by the owners of both lots, it will be presumed in the absence of evidence to the contrary to have become a party wall throughout its length and the owner of either lot may strengthen and repair the foundation of the wall and build the wall higher than the adjoining house. *Fleming* v. *Cohen*, 323.
2. A party wall standing one half on each of two adjoining city lots does not lose its character by the fact that it has declined from a vertical line and leans over one of the lots from three to five inches, and the rights of the owners remain the same as if it was straight. *Ibid.*

PATENT.

United States patent recorded in name of citizen of another State has no *situs* in Massachusetts on which to found jurisdiction of bill to obtain possession of the patent, see JURISDICTION, 2.

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PAUPER.

1. Under our statutes a pauper cannot recover from a city or town for services rendered by him as an inmate of its almshouse. *Taunton* v *Talbot*, 341.
2. Where a city or town maintains a public almshouse, keeping no accounts with an individual inmate, and no expenses are shown to have been incurred particularly for him, and it merely appears that the inmate received support in the almshouse and at the same time rendered services in diminution of the general expenditure equal in value to the cost of his support, the city or town can maintain no action under St. 1882, c. 113, R. L. c. 81, § 9, against such former inmate of its almshouse for money expended for his use. *Ibid.*
3. *Semble*, that under Pub. Sts. c. 84, § 28, (R. L. c. 81, § 32,) the written notice, which the overseers of the poor of a town are required to give when demanding from another town the removal of a pauper, may be signed by only one of the overseers if the others authorize or ratify his action. *Brookfield* v. *West Brookfield*, 524.
4. An answer of a town under Pub. Sts. c. 84, § 29, (R. L. c. 81, § 33,) to a notice from another town demanding the removal of a pauper, refusing the demand on the ground that the pauper's settlement is in the demanding town, waives the right to object to the notice for insufficiency. *Ibid.*
5. By Pub. Sts. c. 84, § 29, (R. L. c. 81, § 33,) the overseers of the poor of a town are empowered to act for the town in making a written answer or statement signed by one or more of them to a notice from another town demanding the removal of a pauper, and therefore can waive the right of the town they represent to object to the notice for insufficiency. *Ibid.*

PAYMENT.

Presumption that note is payment may be rebutted by evidence of contrary intention, and where treating note as payment would deprive party of security this is strong evidence that note was not accepted as payment, see BILLS AND NOTES, 3.

For decision that money received by factor for plaintiff's goods consigned to factor for sale under certain agreement and course of dealing should be applied on open running account between parties and not taken by assignee for creditors of factor, see FACTOR.

PLEADING, CIVIL.

Declaration.

Where no demurrer has been filed and case has been tried on merits, objection to declaration cannot be taken by exception to refusal to rule at end of trial that on pleadings and evidence plaintiff is not entitled to recover, see PRACTICE, CIVIL, 21.

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Variance.

When an item in an account annexed does not describe accurately the claim relied upon, so that an objection on that ground taken at the trial would have been sustained, but where nevertheless the item describes the subject matter of the claim sufficiently to give the defendant information of its character, and the defendant has not suffered from the inaccuracy of the description, the plaintiff may be allowed to recover on the count without amendment. *Holyoke Envelope Co.* v. *United States Envelope Co.* 496.

Declaration alleging that plaintiff was injured when "crossing the junction" of two streets may be supported by evidence of injury when he had been standing for two or three seconds at the corner, see NEGLIGENCE, 18.

PLEDGE.

Instrument declaring pledge of chattel as security for debt held not to constitute pledge for want of delivery of chattel, see MORTGAGE, 3.

Attempted pledge invalid for want of delivery cannot be enforced in equity, see EQUITY JURISDICTION, 21.

Where debtor sets aside shares of stock as security for creditor which debtor retains and then sells, and where at his death other certificates are found with his effects with statement that they are held as security for creditor in substitution for those sold, there is no pledge of original shares on which to base equitable claim for substituted certificates, see EQUITY JURISDICTION, 22.

POLYGAMY.

Where a man against whom decree for divorce has been obtained under Pub. Sts. c. 146, marries within two years a woman who acts in good faith, and parties live together beyond expiration of two years from divorce, marriage is valid within St. 1895, c. 427, and third marriage by husband while second wife is living is polygamous, see MARRIAGE, 1.

POWER.

Sale of chattel under power in an instrument which creates neither mortgage nor pledge ineffective to pass title, see MORTGAGE, 3.

PRACTICE, CIVIL.

Abatement.

1. Under R. L. c. 173, § 76, the decision of a judge of the Superior Court upon a plea in abatement is final. *Fenton* v. *Kane*, 136.

Agreed Statement of Facts.

2. Where an agreed statement of facts provides that the "court may draw such inferences of fact as are warranted" and the Superior Court makes

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a finding thereon, an appeal presents only questions of law, and this court cannot draw inferences of fact. *Webber* v. *Cambridgeport Savings Bank*, 314.

Amendment.

3. An amendment inserting in a writ the name of a minor as plaintiff instead of that of his next friend, filed on the day the writ was entered but not acted on by the presiding judge, although read to the jury by the plaintiff as part of the pleadings, can be allowed by the judge after a verdict for the plaintiff, when first called to his attention by the defendant on a motion for a new trial. *Drew* v. *Farnsworth*, 365.

4. Under R. L. c. 173, § 48, a plaintiff in an action of tort for personal injuries incurred while a passenger on a car of a street railway company, the property of which soon after was leased to and operated by another company, who has brought his action against the operating company, may be allowed to amend his writ and declaration by substituting the leasing company as defendant. *McLaughlin* v. *West End Street Railway*, 150.

5. It is no ground for refusing to allow an amendment to a writ and declaration at law by substituting one sole defendant for another, that if the amendment is not allowed the action against the defendant to be substituted will be barred by the statute of limitations, and this may be an additional reason for allowing such an amendment where the original action was brought seasonably for the same cause. *Ibid.*

Quære, whether action of replevin by buyer at attempted sale under power in instrument creating neither mortgage nor pledge may be amended into suit in equity to enforce rights under instrument, see MORTGAGE, 3.

Appeal.

6. A motion to dismiss an appeal from the Probate Court is a convenient and proper method of raising the question of the appellant's right to appeal. *Leyland* v. *Leyland*, 420.

7. Whether a woman who has obtained a decree of divorce and an execution for alimony, but has made no attachment and has not levied her execution, is a creditor of her former husband, *quære*. But, if she is a creditor, she is a creditor without a lien and as such is not a person aggrieved by a decree of the Probate Court allowing the final account of the guardian of her former husband, who was a minor, within the meaning of R. L. c. 162, § 9, giving a person who is aggrieved by a decree of a Probate Court the right of appeal to the Supreme Judicial Court. *Ibid.*

Auditor.

Plaintiff's failure to attend auditor's hearing held good ground for nonsuit, see *post*, 25.

Conduct of Trial.

8. Where, on a petition for the assessment of damages for the taking of land, the presiding judge has limited each party to seven expert witnesses, it is right for the judge after the petitioner has examined his seven witnesses to prevent the petitioner from extracting an expert opinion on the

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cross-examination of a witness called by the respondent not as an expert. *White* v. *Boston*, 65.

9. The refusal of a presiding judge to allow a witness for the plaintiff on rebuttal to contradict certain evidence for the defendant, on the ground that the testimony should have been put in as part of the plaintiff's case, is not a matter of exception, being within the discretion of the presiding judge. *Burnside* v. *Everett*, 4.

10. In an action for personal injuries, upon a statement of the plaintiff's counsel, unsupported by proof and denied by the defendant, that the plaintiff is unable to come into court to testify except upon a stretcher or in a reclining position, it is within the discretion of the presiding judge to deny a motion of the plaintiff made before the trial, that the plaintiff be allowed to come into court to testify in a reclining position, supported on a stretcher or couch. *Blanchard* v. *Holyoke Street Railway*, 582.

11. In an action for personal injuries, if the presiding judge finds that the plaintiff is unable to testify except in a reclining position and that she can testify in this way, whether it is the duty of the judge to permit her to be brought before the jury upon a stretcher instead of testifying by deposition, *quære*. *Ibid.*

Refusal to permit view of plaintiff at her home within discretion of presiding judge, see *post*, 31.

Motion to dismiss.

Motion to dismiss appeal from Probate Court is proper method of raising question of appellant's right to appeal, see *ante*, 6.

Exceptions.

12. Discussion by HAMMOND, J., of the history and effect of exceptions in this Commonwealth. *Tyndale* v. *Stanwood*, 59.

13. The admission of immaterial evidence furnishes no ground of exception unless the excepting party was harmed by its admission. *Higgins* v. *Shepard*, 57.

14. The burden is upon a party excepting to the admission of evidence to show that he was prejudiced by its admission. *McGonigle* v. *Belleisle Co.* 310.

15. No exception lies to a refusal to give instructions which are given in substance. *White* v. *Boston*, 65.

16. No exception lies to the exclusion of a question based on the assumption of a fact which is not in evidence. *Ibid.*

17. No exception lies to the admission of evidence afterwards introduced in another form without objection from the excepting party. *Morrison* v. *Lawrence*, 456.

18. It is no ground for exception, that a presiding judge refuses to instruct the jury upon a part of the evidence and to say that there is a possible view of the evidence which would warrant them in coming to a certain conclusion. *Lakeside Manuf. Co.* v. *Worcester*, 552.

19. Until a general verdict has been returned on which a judgment can be entered, no exception lies to the refusal of a presiding judge to rule upon

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facts found by the jury in answer to specific questions. *Crossin* v. *Beebe*, 472.

20. No exception lies to the whole charge of a judge. *Savage* v. *Marlborough Street Railway*, 203.

21. In an action of tort against a street railway company for personal injuries alleged to have been caused by the defendant's negligence, where the defendant has not demurred to the declaration and has tried its case on the issue of negligence, it cannot, by an exception to the refusal of a ruling that on the pleadings and the evidence the plaintiff is not entitled to recover, raise the point that the declaration contains no allegation of negligence or intentional harm on the part of the defendant. *Ibid.*

22. If after a charge to a jury a request for a ruling is made and refused, and the judge gives further instructions upon the question of law raised by the request, if the party presenting the request remains silent, and does not claim an exception until his bill of exceptions is presented for acceptance, under Rule 48 of the Superior Court he has lost the right to except to the refusal of the ruling, and it does not matter that he meant to save an exception and supposed in spite of his silence that he had done so. *Jones* v. *Newton Street Railway*, 113.

Exclusion of evidence offered in rebuttal of defendant's evidence because it should have been put in as part of plaintiff's case is matter of discretion, see *ante*, 9.

Findings of assessor may be reviewed only by specific objections and request of report of evidence bearing on points covered by exceptions to assessor's reports, see *post*, 29.

Findings of Commissioner on Appeal for Abatement of Taxes.

Findings of fact of commissioner appointed on appeal for abatement of taxes not subject of exception to full court, see TAX, 5.

Where commissioner appointed on appeal for abatement of taxes reported evidence although rule ordered him only to report facts and Superior Court treated evidence as before it, this court treated case as if rule required report of evidence as well as of facts, see TAX, 6.

New Trial.

23. In an action of contract after the question of the defendant's liability has been decided against him by this court and the case is ordered to stand for the assessment of damages and is sent by the Superior Court to an assessor, the defendant cannot raise the question of his liability either at the hearing before the assessor or by a request for a ruling of the Superior Court on a motion for a new trial. *National Machine & Tool Co.* v. *Standard Shoe Machinery Co.* 44.

24. It is a proper exercise of discretion for a presiding judge to deny a defendant's motion for a new trial made on the ground that the plaintiff's counsel in his closing argument commented on certain matters not in evidence, if the presiding judge on the defendant's objection directed the plaintiff's counsel to confine his argument to the evidence and the counsel thereafter did so, especially where the defendant allowed the case to go to

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the jury without attempting to have the trial ended on account of the impropriety. *Am. Elec. Works* v. *N. E. Elec. R. R. Con. Co.* 546.

Nonsuit.

25. Where in an action in the Superior Court an auditor has been appointed under R. L. c. 165, § 55, and upon application of the defendant the court under § 59 of the same chapter has appointed a certain day for the hearing of the case, and the plaintiff after notice fails to appear at the hearing and likewise fails to appear at successive adjournments of the hearing made necessary by his absence, of each of which he was notified, this furnishes good ground for ordering a nonsuit in accordance with the provisions of the section last named. *Hunt* v. *Hill*, 146.

Parties.

26. The misjoinder of a defendant in an action at law is not a good ground of demurrer for another defendant against whom a good cause of action is stated. *Livermore* v. *County of Norfolk*, 133.

27. In an action of contract against two defendants jointly, if the declaration is amended by striking out the name of one of the defendants and the trial proceeds against the other, and there is evidence of a joint promise made to the plaintiff by the two original defendants, a verdict for the plaintiff will be sustained, as the remaining defendant could take advantage of the non-joinder of the other only by a plea in abatement. *Townsend* v. *Wheatland*, 343.

Report of Assessor.

28. A motion to recommit the report of an assessor is addressed to the discretion of the presiding judge and his decision thereon is not the subject of exception or appeal. *National Machine & Tool Co.* v. *Standard Shoe Machinery Co.* 44.

29. If a party to an action desires the findings of an assessor to be reviewed by the Superior Court, he must take specific objections to them and request a report of so much of the evidence as bears upon the points covered by his exceptions. Only in this way can rulings of the Superior Court on questions of law relating to the assessor's report be brought before this court. *Ibid.*

Report of Referee.

30. Where an action of contract on an account annexed for work and materials is sent by agreement of parties to a referee, under an order of court giving him power to decide finally all questions in the case, it is error to recommit his report on the ground that a part of his decision relates to a matter not included in the submission, merely because the matter referred to is not expressly mentioned in the account annexed, if the report tends to show that the matter in question was a part of the work and that the declaration might have been amended by including it in the description of the work in the account annexed. *Electric Supply, etc. Co.* v. *Conway Elec. Light & Power Co.* 449.

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Verdict.

Until general verdict returned, no exception to refusal of judge to rule upon facts found by jury in answer to specific questions, see *ante*, 19.

View of Plaintiff.

31. In an action for personal injuries, it is within the discretion of the presiding judge to refuse to permit the jury to take a view of the plaintiff at her home, in order to judge of the extent of her injuries, upon a statement of her counsel made before the trial that she is unable to come into court to testify except upon a stretcher or in a reclining position. *Blanchard* v. *Holyoke Street Railway*, 582.

PRACTICE, CRIMINAL.

Motion to quash.

1. Under R. L. c. 219, § 21, a motion to quash a complaint for defects of form cannot be made for the first time in the Superior Court in a case which has come to that court by appeal from a municipal court. *Commonwealth* v. *Anselvich*, 376.

New Trial.

2. The granting of a new trial in a criminal case on account of the disability of a juror which was not known to the defendant until after his conviction is within the discretion of the presiding judge. *Commonwealth* v. *Wong Chung*, 231.

Exceptions.

3. No exception lies to a refusal to give a ruling although correct if the subject of the ruling was covered sufficiently by the instructions given, or if an instruction was given more favorable to the excepting party than that refused. *Commonwealth* v. *Adams*, 101.
4. A defendant in a criminal trial has no more right than a party to a civil action to pick out a portion of the evidence and ask for a ruling upon it, and the refusal of a request for such a ruling is no ground for exception. *Ibid.*

Proceedings on Habeas Corpus.

Where proceedings on petition for writ of *habeas corpus* are adjourned into the full court by order of single justice, facts must be reported although uncontroverted if not agreed in writing, see HABEAS CORPUS, 2.

PRESCRIPTION.

Owners of adjoining buildings may acquire by prescription mutual easements of support and shelter, see EASEMENT.

Mill owner cannot acquire prescriptive right to have upper riparian proprietors continue to maintain reservoirs which they have right to maintain, and which operate to advantage of his mill, see WATERCOURSE.

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PROBATE COURT.

The Probate Courts have full equity powers in regard to petitions for separate support. *Bailey* v. *Dillon*, 244.

Under Pub. Sts. c. 144, § 9, court may reopen trustee's accounts settled without notice to person interested at settlement of subsequent account, see TRUST, 18.

If woman holding execution for alimony not levied is creditor of former husband, she has no lien and is not entitled to appeal from decree of Probate Court allowing final account of guardian of former husband, see PRACTICE, CIVIL, 7.

Court of equity will not enjoin proceedings by wife in Probate Court for support in violation of valid contract which may be set up as defence in Probate Court, see EQUITY JURISDICTION, 23.

PROXIMATE CAUSE.

City or town liable if defect in highway was proximate cause of injury although innocent act of third person contributed, WAY, 10.

One who negligently allows horses to run away may be found liable for injury done by them although person trying to stop them made them swerve from their course by hitting one with rake, see NEGLIGENCE, 4.

Where operator of elevator starts it causing accident by grasping lever when falling back in trying to sit on stool which has been moved without his knowledge, grasping of lever and not presence of stool is proximate cause of accident, see NEGLIGENCE, 24.

On failure by bank holding draft for collection to return it at once on non-payment at maturity as instructed, loss from debtor's failure held natural consequence of delay where at time of maturity debtor had sufficient property open to attachment and did not intend to fail, see BILLS AND NOTES, 6.

RAILROAD.

Liability under R. L. c. 111, § 268.

1. In an action against a railroad company under R. L. c. 111, § 268, for the loss of life of the plaintiff's intestate at a grade crossing of a highway caused by the defendant's failure to give the signals required by § 188 of the same chapter, if it appears that the required signals were not given, the plaintiff need only prove further that his intestate was killed by the train at the crossing. If the defendant relies upon gross negligence of the intestate as a defence, he must establish it by evidence *McDonald* v. *New York Central & Hudson River Railroad*, 474.

2. In an action against a railroad company under R. L. c. 111, § 268, for the loss of life of the plaintiff's intestate at a grade crossing, alleged to have been caused by the defendant's neglect to give the signals required by § 188 of the same chapter, if two witnesses who might have heard the signals testify that they were not given, and other witnesses, who

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were in such positions that if the signals had been given they easily might have heard them, testify that they did not notice the signals or do not remember them, there is evidence to justify a finding that the signals were not given. *McDonald* v. *New York Central & Hudson River Railroad*, 474.

Right to dig up Street at Grade Crossing.

3. A railroad company maintaining gates where its tracks cross a public highway at grade has a right to dig up the surface of the street within its own location to repair the gates so as to operate them as required by law, without obtaining permission from the city maintaining the highway, and an ordinance of the city requiring the railroad company to apply for a license or give a bond before doing such work would be void. *New York Central & Hudson River Railroad* v. *Cambridge*, 249.

4. An ordinance of a city forbidding the digging up of the ground in any street or otherwise occupying, encumbering or obstructing the street without obtaining a written license from the superintendent of streets and complying in all respects with the conditions of such license, cannot be construed to apply to repairs made by a railroad company within its own location where its tracks cross a highway at grade. *Ibid.*

As to absence of end platforms on mail cars in violation of R. L. c. 111, § 214, as evidence of negligence, see NEGLIGENCE, 12.

No liability to woman injured while leaving moving train aided by brakeman, see NEGLIGENCE, 10, 11.

Brakeman and flagman at railroad crossing not acting in course of employment in tossing signal torpedo back and forth and afterwards leaving it on crossing, see MASTER AND SERVANT.

Liability of railroad to brakeman running forward at night to make coupling and striking against end of one of pair of gates at railroad crossing improperly projecting out of line, see NEGLIGENCE, 9.

REAL ACTION.

Under R. L. c. 146, § 17, an administrator cannot maintain a writ of entry to recover land fraudulently conveyed by his intestate which he alleges that he is licensed to sell as administrator, when an appeal has been taken from the decree of the Probate Court granting him the license to sell the land, and exceptions to the order of a single justice of this court confirming the decree of the Probate Court and to rulings of the single justice have not been passed upon by the full court, and, even if the order of the single justice is affirmed by the full court while the writ of entry is pending, the demandant cannot recover in his action thus prematurely brought. *Tyndale* v. *Stanwood*, 59.

RECEIVER.

No occasion for appointment of receiver under R. L. c. 144, of property of absentee where it does not appear that absentee ever became entitled to property, see ABSENTEE, 3.

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Receiver (*continued*).

No occasion for receiver on petition for partition of real estate of heirs of estate not yet settled. *Quære* as to power of court to appoint receiver in such case, see PARTITION, 2.

Where funds of corporation are in hands of receiver, creditor of creditor of corporation cannot intervene in receivership suit to reach and apply to his claim a receiver's dividend to creditor of corporation, see EQUITY JURISDICTION, 4.

REFEREE.

Referee passing an account annexed for work and materials properly may include in his report matter not mentioned in account if report shows matter was part of work and declaration might have been amended by including it in description of work in account annexed, see PRACTICE, CIVIL, 30.

REPLEVIN.

A candidate in a voting contest for a chattel at a fair, if the committee having authority in the matter declare another person to be the winner and make a symbolical delivery of the chattel to such other person, cannot maintain replevin for the chattel on the ground that the decision of the committee was wrong and that he should have been declared the winner, having no title and no right to possession. *Fisher* v. *Alsten*, 549.

RES JUDICATA.

Where the Commonwealth as against a city has the right to have the city remove the filling from a certain old archway under a highway and construct a culvert there, and seeks to enforce this right in a suit in equity in which a certain manufacturing corporation properly is joined as a defendant, the fact, that the corporation is precluded, by a decree in a former suit brought against the metropolitan park commissioners for damages, from maintaining that the city should construct the culvert, is no defence for the city as against the Commonwealth whose claim against the city was not involved in the former suit. *Commonwealth* v. *Newton*, 286.

It is no defence to bill in equity by administrator to redeem that all interested in estate are parties and therefore decree rendered might make same issues afterwards raised in Probate Court *res judicata*, see EQUITY JURISDICTION, 13.

RULES OF COURT.

Under Rule 48 of Superior Court no exception to refusal of ruling can be allowed unless taken at time of ruling, see PRACTICE, CIVIL, 22.

SALE.

What constitutes.

1. Where a banker advances money to a merchant for the importation of goods on a letter of credit, under a contract by which the goods are

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consigned to the banker and he is to retain the title until he sells the goods in his own name, paying the surplus of the proceeds to the merchant after deducting the amount of his advances and commissions, duties and charges, the banker is the owner of the goods, and is not a mortgagee or pledgee within the meaning of Pub. Sts. c. 157, § 28, relating to the proof of a claim in insolvency by a creditor having a mortgage or pledge. *Moore* v. *Drury*, 424.

Agreement, "We this day enter you on contract for the following. . . . To be delivered in lots as wanted prior to April 1st," held not to show clearly sale for future delivery rather than agreement to sell if called for before April 1, see CONTRACT, 15.

Where only assets on dissolution of partnership are two bonds of which each of two partners agrees to take one, and one partner who has advanced purchase price for both agrees to carry bond of other partner for him but on his failure to pay as agreed sells bond at auction for less than purchase price, he may recover balance from partner, the transaction not being contract of sale within statute of frauds, see FRAUDS, STATUTE OF, 3.

Acceptance.

2. One who receives an electrical storage battery manufactured for him under a contract in writing on which he has made several payments, and finding it not to be in accordance with the contract seasonably notifies the manufacturer of his rejection of the battery, but thereafter continues to use it in his business for several months and until he is enjoined from doing so in a suit by a third party, has lost his right to reject the battery and recover the money he has paid on account of it, his only remedy being an action for damages for breach of contract. *Graham* v. *Hatch Storage Battery Co.* 226.

3. In an action to recover money paid under a contract for the purchase of an electrical storage battery on the ground that the battery is not in accordance with the contract, in which the defendant prevails on the ground that the plaintiff has lost his right to reject the battery by continued use of it after notifying the defendant of his refusal to accept it, the exclusion of evidence, that the battery furnished by the defendant is an infringement of a patent held by another person, gives no ground for exception, this evidence being material only on the question of damages for breach of contract which is not the issue. *Ibid.*

When Title passes.

4. Where there is an agreement for the sale of a specific article and something remains to be done, as weighing or measuring it, and there is no evidence tending to show an intention that the title should pass before the weighing or measuring is performed, the weighing or measuring is a prerequisite to the passing of the title. Approving the rule stated in Riddle *v.* Varnum, 20 Pick. 280. *Wesoloski* v. *Wysoski*, 495.

5. In an action for the conversion of certain onions, it appeared, that onions are sold by weight and before weighing have to be screened to separate them from the husks and from those onions which are too small

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to be merchantable, that the plaintiff owning certain onions, which were stored in a warehouse, agreed to sell them to the defendant at a certain price per bushel when they were screened and weighed, and that the defendant agreed to screen the onions with the plaintiff's help and also pay for them on a certain day, that, after the day agreed upon, the plaintiff finding the onions at the warehouse unscreened told the defendant not to take them. Whereupon the defendant said that he had sold the onions, and the next day screened and weighed the onions and shipped them away. *Held*, that the screening and weighing of the onions were prerequisites to the passing of the title, so that no title had passed to the defendant when the plaintiff rescinded the contract, and that the sale of the onions by the defendant before they were screened and weighed was in itself a conversion without a demand and refusal. *Wesoloski* v. *Wysoski*, 405.

Title to lumber placed by contractor on bridge in process of construction is in contractor until wrought into bridge, see CONTRACT, 8.

Conditional.

6. The provision of St. 1898, c. 545, now incorporated in R. L. c. 198, § 13, that the vendor before taking possession of furniture under a contract of conditional sale "for non-compliance with the terms of such contract . . . shall make a demand in writing for the balance then due, at least thirty days before taking possession," applies only where the breach of contract is default in the payment of money, and does not apply to a retaking of the furniture by the vendor on account of its removal by the vendee in violation of the terms of the contract. *Brown* v. *Goldthwaite Furniture Co.* 51.

7. If a contract of conditional sale of furniture contains a provision that the furniture shall not be removed without the consent in writing of the vendor, and the furniture is removed by the vendee without such consent, the sending by the vendor of a copy of the contract of sale to the vendee at the place to which the furniture has been removed can be found to be a waiver by the vendor of his right to retake the furniture on its removal without his consent. *Ibid.*

Rights in Insurance Policies on Property sold.

8. On August 18 of a certain year a corporation made a bill of sale to a new corporation, for a round sum of money, of all its stock in trade and "all its business and good will as a going concern," with a provision that the business should be considered as belonging to the purchaser from and after December 31, of the previous year. "Accounts receivable" before the the beginning of the current year were excepted from the property assigned. Unexpired insurance policies on the property were delivered to the purchaser when the papers passed. These were cancelled on August 18, and return premiums were received thereon which were credited on new policies issued to the purchaser. *Held*, that the insurance policies on hand at the close of the previous year were not sold to the purchaser as included in the round price, and that on an accounting between the selling

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and purchasing corporations the seller was entitled to credit for the pro rata value of the policies from the end of the previous year to August 18, when the bill of sale was delivered and accepted, it having been shown that it is customary to allow pro rata value in place of surrender value when new insurance is taken out through the same agency. *Held, also,* that a previous contract giving the purchaser the option to purchase the property, which it exercised, and providing that the seller should keep the property insured during the period of option, did not change the rights of the parties in this regard. *Holyoke Envelope Co.* v. *United States Envelope Co.* 498.

SAVINGS BANK.

A by-law of a savings bank provided as follows: "No person shall receive any part of his principal or interest, without producing the original book, that such payments may be entered therein, unless it is proved to the satisfaction of the trustees or the treasurer that such book shall have been lost or destroyed, in which case a legal discharge shall be given." *Held*, that, even if intended to do so, this by-law could not oust the courts of their jurisdiction by substituting the trustees or treasurer as the tribunal to determine whether a bank book was lost or destroyed, and in an action to recover a deposit alleged to have been made by the plaintiff's intestate in a savings bank having such a by-law, where the bank book is not produced, a finding for the plaintiff can be sustained if there is evidence sufficient to satisfy the mind of a reasonable man that the bank book has been lost or destroyed. *Webber* v. *Cambridgeport Savings Bank*, 314.

Whether order by depositor to pay deposit to another is gift or merely authority to enable him to draw money for depositor depends on intent of depositor, see GIFT, 2.

Declaration of intention to give savings bank book to another and directions to lawyer for draft of will not good ground for suit in equity for book or money represented by it, see GIFT, 3.

SCHOOLS AND SCHOOL COMMITTEE.

1. In an action against a city for the alleged unlawful exclusion of the plaintiff from its public schools, the plaintiff may testify to what was said by the principal of the school from which he was excluded to the superintendent of schools, when the principal took the plaintiff before the superintendent, the interview resulting in the superintendent informing the plaintiff that he was suspended, although neither the superintendent nor the principal are parties to the action, it being a part of the plaintiff's case to show that he did not leave school voluntarily and to show the character of his exclusion, especially where the principal himself on cross-examination as a witness at the trial has given a narration of the proceedings before the superintendent. *Morrison* v. *Lawrence*, 456.

2. In an action against a city under St. 1898, c. 496, § 9, (R. L. c. 44, § 7,) for the alleged unlawful exclusion of a pupil from its public schools, if it

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appears that before the pupil's permanent exclusion the school committee gave him a fair trial at which he was allowed to present the merits of his cause, mere errors in the admission or exclusion of evidence by the committee are not enough to invalidate a final decision against him, but if it appears that evidence, offered by the pupil and material to his defence before the committee, was excluded in such a manner as to exhibit prejudice against the pupil or a wilful indifference to his rights, a jury may find that the school committee did not conduct the hearing in good faith. On the evidence in the present case it was held, that the question, whether the school committee acted in good faith in conducting the hearing given to the plaintiff before his permanent exclusion, was a question of fact for the jury under proper instructions from the presiding judge. *Morrison* v. *Lawrence*, 456.

SLANDER.

As to publication of libel sent by mail to plaintiff and opened by another in course of business, see LIBEL AND SLANDER, 1, 2.

STATUTE.

Construction.

1. A statute giving damages for injuries to land from the construction of sewerage works authorized by the statute, in the absence of an express provision that the remedy is to be exclusive, will not be construed to take away the right of a landowner to maintain an action of tort for injuries to his land from tortious or negligent acts done in exercising the powers conferred by the statute. So of the remedy given by § 5 of St. 1897, c. 426, relating to sewerage works of the city of Boston. *Westcott* v. *Boston*, 540.

St. 1896, c. 321, construed to give Superior Court authority, in accepting report of commissioners as to abolition of certain grade crossings to take additional land for passenger station outside of location of railroad as designated in report, see GRADE CROSSING ACTS.

As to construction and constitutionality of St. 1895, c. 427, making valid certain marriages where parties continue to live together after removal of impediment, see MARRIAGE, 1–3.

Repeal.

2. By R. L. c. 226, § 2, a statute repealed by R. L. c. 227, but embodied in substance in a provision contained in a preceding chapter of the Revised Laws, is construed as continued in force and not as repealed and reenacted. *Commonwealth* v. *Anselvich*, 376.

3. Under R. L. c. 226, §§ 4, 5, 6, in regard to the effect of a repeal of a law by the Revised Laws, the filing and publication of the description of a name used as a trademark on registered bottles, if made under St. 1893, c. 440, § 1, is good under R. L. c. 72, § 15, embodying the same provision in substance, although St. 1893, c. 440, is enumerated among the laws repealed by R. L. c. 227. *Ibid.*

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STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 707.

STREET RAILWAY.

1. A foot traveller on a highway who is approaching and intending to board a street car, which in response to a signal from him has stopped to receive him, is not a passenger on the car before he reaches it, and until he begins to enter the car the company operating it owes him only the duty which it owes to all persons lawfully upon the street. *Duchemin* v. *Boston Elevated Railway*, 353.
2. Whether a street railway company, which by statute is bound to keep the surface of the portions of streets occupied by its tracks in repair, is liable for an injury to a traveller, who in the exercise of due care falls between its tracks into a deep trench filled or partly filled with soft mud, depends on the questions of fact whether the trench had been filled to a point where the company became responsible, whether, if it had, the company had been negligent in attending to the duty of repair, and whether such negligence contributed to the injury. *Hyde* v. *Boston*, 115.
3. In §§ 32, 33 of Pub. Sts. c. 113, requiring street railway companies to keep certain portions of highways in repair, which are still in force as to the Boston Elevated Railway Company, (R. L. c. 112, § 1,) the phrase "occupied by its tracks" means the rails and the space between them over which the cars pass and does not include the space occupied beneath the surface by the sleepers supporting the rails. *Boston* v. *Boston Elevated Railway*, 274.

As to negligence on street railway, see NEGLIGENCE, 13–16.

SUBROGATION.

1. Certain judgments were recovered against a city for injuries from a defect in one of its highways, consisting of an excavation made and left unguarded by a contractor laying a water pipe under a contract with the metropolitan water board. The Commonwealth, being liable under St. 1895, c. 488, § 12, to indemnify the city for this loss, paid the amounts of the judgments directly to the judgment plaintiffs. The city then brought an action of tort for the benefit of the Commonwealth against the contractor whose acts and

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omissions caused the defect. *Held*, that the Commonwealth was subrogated to the rights of the city against the contractor, and could recover the amounts of the judgments in the name of the city although the Commonwealth had discharged the liability of the city by paying the judgments directly. *Cambridge* v. *Hanscom*, 54.

2. If a city is sued for injuries from a defect in a highway consisting of an excavation made and left unguarded by a contractor laying a water pipe under a contract with the metropolitan water board, and if the Commonwealth, being liable under St. 1895, c. 488, § 12, to indemnify the city for any judgment recovered against it on account of this defect, undertakes the defence of the action and employs the city solicitor as its counsel, the city solicitor having the right to engage in business outside of and in addition to his work for the city, the counsel fee paid by the Commonwealth to the city solicitor in compensation for his services is paid for its own benefit, and, after the Commonwealth has paid the amount of the judgment against the city and has brought an action in the name of the city against the contractor whose fault caused the defect in the highway, the Commonwealth cannot include such counsel fee in its claim of subrogation to the rights of the city against the contractor. *Ibid.*

3. In an action against a married woman upon a guaranty in writing to make good any loss incurred by the plaintiff in guaranteeing advances made by bankers to the defendant's husband in connection with the importation of goods by him, if it appears that there was an arrangement between the plaintiff, the defendant's husband and the bankers, by which the bankers were entitled to a lien on the bills of lading and the goods imported to secure their advances, if also it appears that the plaintiff in a course of business known to the defendant and acquiesced in by her delivered the bills of lading to the defendant's husband or sold the goods and credited the defendant's husband with the proceeds less commissions, the defendant can be found to have waived any right of subrogation she otherwise might have had to any lien of the bankers upon the bills of lading or the goods or their proceeds, and any right she might have had to treat the release of such lien by the acts of the plaintiff as payment *pro tanto* on her guaranty to him. *Paddock & Fowler Co.* v. *Simmons*, 152.

SUPREME JUDICIAL COURT.

Justices giving opinions to branch of Legislature or to Governor and Council under Constitution of Massachusetts, c. 3, art. 2, do so only so far as required to aid in official duties as to matter then pending, see CONSTITUTIONAL LAW, 9.

SURVIVAL OF ACTIONS.

Suit under R. L. c. 187, § 23, may be maintained by grantor's administrator to redeem land from deed absolute in form but really given as security, see EQUITY JURISDICTION, 11.

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Right to equitable relief founded on failure to perform duties arising from fiduciary relation survives to executor or administrator, including right to redeem property held under deed absolute in form but intended as mortgage, see EQUITY JURISDICTION, 19.

TAX.

To whom assessable.

1. Land taken under the right of eminent domain for a highway or for railroad purposes is not taxable to the owner of the fee. *Lancy* v. *Boston*, 128.
2. Land taken for a highway and for railroad purposes by a decree of the Superior Court accepting a report of commissioners under the provisions of St. 1896, c. 321, authorizing the abolition of certain grade crossings, cannot be taxed to the former owners although a copy of the decree is not filed in the registry of deeds until after the first of May when the tax is assessed. *Ibid.*

Abatement.

3. Under R. L. c. 12, § 73, an application to the assessors of a city or town for an abatement of taxes need not be in writing. *Page* v. *Melrose*, 361.
4. On an appeal to the Superior Court for an abatement of taxes, the facts, that a partial abatement was made by the assessors, that interest was charged upon the tax bill only from January 20, and that the assessors by a letter in February informed the petitioner that the board had voted to take no action toward reducing the assessed valuation of his estate, are evidence justifying a finding that the petitioner made a sufficient oral application for an abatement within six months from the date of his tax bill as required by R. L. c. 12, § 73. *Ibid.*
5. The findings on matters of fact of a commissioner appointed under R. L. c. 12, § 80, on an appeal to the Superior Court for an abatement of taxes, are not open to revision by this court on exceptions. *Ibid.*
6. Where in a case before this court on exceptions, the report of a commissioner appointed by the Superior Court on an appeal for an abatement of taxes reported the evidence, although the rule to the commissioner ordered him only "to hear the parties and report the facts to the court," and the Superior Court treated the evidence as before it upon the commissioner's report, this court considered the case as if the rule had required a report of the evidence as well as of the facts. *Ibid.*
7. On an appeal to the Superior Court for an abatement of taxes the commissioner's report stated that no evidence was offered as to whether or not the assessors issued or published any notice to bring in returns under R. L. c. 12, §§ 41, 74, there was in evidence, produced by the respondent, a list of the petitioner's property on a blank in the usual form indorsed for filing as such and sworn to by the petitioner before one of the assessors on May 31 of the year in question, and it appeared that the assessors had abated a certain sum from the petitioner's tax as originally assessed. *Held*, that, taking into account the presumption that the assessors pro-

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ceeded according to law in all their official doings, the evidence justified the commissioner in finding that the petitioner brought in a list of his real and personal estate as required by R. L. c. 12, § 41, seasonably filed within the requirement of § 74. *Page* v. *Melrose*, 361.

Sale.

8. A parcel of land was sold for taxes assessed upon the whole parcel. Before the assessment, by proceedings under a grade crossing act a part of the land had been taken for a highway and was exempt from taxation and another part had been taken for railroad purposes but was outside of the railroad location and was taxable to the railroad company. A third part still belonged to the owners from whom the other parts had been taken and to whom the whole parcel was assessed. *Held*, that the sale was void, as no part of the land was subject to a lien for the collection of one undivided tax on the three portions. *Lancy* v. *Boston*, 128.

Redemption.

9. Where the remedy for redemption of land from a tax sale has been enlarged by statute between the time of the assessment of the tax and the time of the sale, a purchaser at the sale takes his title subject to the law in regard to redemption as it stands at the time of the sale and not as it stood at the time of the assessment. *Rogers* v. *Nichols*, 440.

St. 1902, c. 443, enlarging right to redeem from tax sale, is constitutional as applied to sales for non-payment of taxes assessed before its enactment, see CONSTITUTIONAL LAW, 2.

TRADEMARK.

Unlawful Use and Sale of Registered Bottles.

Filing and publication of trademark on registered bottles under St. 1893, c. 440, § 1, is good under R. L. c. 72, § 15, see STATUTE, 3.

If R. L. c. 72, § 18, authorizing search warrants in case of unlawful use and sale of registered bottles is unconstitutional, its unconstitutionality does not affect validity of § 16 imposing penalty for such use, which section is constitutional, see CONSTITUTIONAL LAW, 6, 7.

TRADE NAME.

Property in a trade name cannot be assigned in gross apart from the business which it designates. *Crossman* v. *Griggs*, 275.

TRUST.

Creation.

1. A married woman living apart from her husband made savings bank deposits in her name as trustee for her adopted son, and also in the joint names of herself and her adopted son subject to withdrawal by either or the survivor. The adopted son never knew of the deposits until after her

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death. After retaining the savings bank books for about three years and making deposits in the accounts from time to time, the depositor in contemplation of a surgical operation placed the books in the hands of a woman friend, with other similar books in a sealed package, accompanied by a request in writing that the books for her son should remain "in trust" for his benefit and the fund be used, in the discretion of the trustee, for his clothing, education and expenses, and that if any balance remained it was to be paid to the son absolutely upon his marriage or, if his father died before him, such payment in the discretion of the trustee could be made before the son came of age. The depositor did not die from the operation but lived more than two years, during which time, although once she made an examination of them, she left the books in the control and possession of the trustee, who continued to hold them until after the death of the depositor. *Held*, that these facts warranted a finding that an express trust was created, and that the delivery of the bank books was not intended as a *donatio causa mortis*. *Peck* v. *Scofield*, 108.

Declaration of trust as to mortgaged real estate held as security stating it to be subject to prior mortgages does not make prior mortgagees *cestuis que trust*, see *post*, 11.

Precatory.

2. A testatrix, a widow, after providing for her children other than her son H., made the following bequest to her daughter in law S. wife of H.: "To S. wife of H., I devise and bequeath the sum of $2000 this amount is to be free from the control of her husband and her son G., and I request the said S. at her death to give the same to her two daughters V. and M., but the receipt of the said S. for the said amount shall be a sufficient discharge to my executors therefor." *Held*, that, under the law of Nova Scotia as proved in the case, this bequest, construed in the light of other portions of the will, created a trust, under which S. held the $2,000 with the right to use the income during her life, the principal to go to her two daughters upon her death, the word "request" being used in an imperative sense. *McCurdy* v. *McCallum*, 464.

3. A testatrix devised and bequeathed all her property to a certain nephew, who had come to live with her and had taken care of her property on a promise from her that she would give him by will the principal portion of her estate. After the gift to the nephew the will proceeded as follows: "I make this disposition of my estate as I have heretofore expressed to my said nephew my desires concerning the division and disposition of my estate and I have full confidence that he will respect my wishes and will carry them out so far as possible. I request him to make testamentary disposition of such portion of my estate as may call for the same in his judgment. I understand this request has no legal effect, and rely wholly upon the confidence I have in my said nephew." *Held*, that the word "request" in the sentence last quoted did not refer merely to the word "request" in the sentence immediately preceding, but that the sentence last quoted qualified also the sentence in which the testatrix expressed full confidence that her nephew would respect her wishes and

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carry them out so far as possible, and that in view of the relation of the parties no precatory trust was created. *George* v. *George*, 75.

4. To determine whether the language of the will of a woman leaving all her property to a certain nephew creates a precatory trust, evidence properly may be admitted that eleven years before the will was made the nephew was asked by the testatrix to leave his home in another city, to take charge of her property and to make his home with her, under a promise "that if he did so she would at her decease give to him the principal portion of her estate", this agreement being a part of the relations existing between the testatrix and her nephew. *Ibid.*

5. In a suit in equity to establish a precatory trust under a will by which a testatrix left all her property to a certain nephew, who had come to live with her and had taken care of her property on a promise from her that she would give him by will the principal portion of her estate, the defendant under R. L. c. 175, § 66, may introduce declarations of the testatrix that the value of her real estate had greatly depreciated, that her personal expenses, owing to her sickness, had greatly increased so that her personal estate was diminished rapidly, that she realized that it would diminish still more rapidly if she should live long in her present condition of health, and that her real estate had depreciated a great deal. *Ibid.*

Oral.

6. The statute of frauds is no defence to a bill in equity to establish an oral trust by showing that the defendant holds certain real estate as an equitable mortgage or in trust for the plaintiff on being paid the debt for which it is held as security. *Potter* v. *Kimball*, 120.

Statute of limitations does not begin to run in favor of trustee in oral trust until he repudiates trust, see LIMITATIONS, STATUTE OF, 1.

Delay for twenty years to establish oral trust not laches if trust was recognized by parties during that time and delay did not change situation of holder of title, see EQUITY JURISDICTION, 5.

Construction.

7. A testator by his will disposed of all his personal property, which was substantial in amount. On the same day that he executed the will he had conveyed all his real estate to a trust company, which was named as executor in his will, upon certain trusts. The trust deed contained the following provision: "After my death said trustee may use as much of the income from said property as may be necessary, or the proceeds of the sale of the property, in defending my estate from any claims which it deems to be unjust, and particularly in defending any proceedings brought to invalidate this trust; also for the sustaining of said trust and the probate, or sustaining of my will dated this day, and to defend any attack against said will" The will recited the provisions of the trust deed and was made subject to them. The trust company as executor under the will included in its first account payments made by it for expenses of defending the estate from claims deemed to be unjust, of proving the will

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and of resisting an attack upon it by persons interested in preventing its allowance. The allowance of these items in the executor's account was opposed on the ground, that the trust deed made such payments a charge upon the real estate. *Held*, that the items properly were allowed in the executor's account, the words "may use" in the provision of the trust deed above quoted being permissive and not mandatory, this conclusion being strengthened by the difference in the meaning of the words "may" and "shall" as used in other clauses of the trust deed. *Hampden Trust Co.* v. *Leary*, 577.

For construction of trusts created by will, see DEVISE AND LEGACY, 2, 3, 5, 8, 9.

Termination.

8. It is within the power of the court to terminate a trust as to certain property and continue it as to other property where reasons exist for doing so. *Williams* v. *Thacher*, 293.

9. A testator provided that a trust for his children should terminate when his youngest surviving child arrived at the age of twenty-one years, and another clause of his will provided that a portion of the trust fund consisting of one undivided half of the mansion house and appurtenant buildings and lands formerly belonging to the testator's father should be used and occupied by the testator's sister during her life or until sold under a power of sale given to the trustees to hold the proceeds subject to the trust, and that all taxes and assessments on the mansion house property should be paid by the trustees during the life of his sister. When the testator's youngest child came of age the testator's sister was still living and objected to the termination of the trust. *Held*, that the trust should be terminated as to all the property except that in which the testator's sister had a life interest and so much more as was necessary to provide for the payment of taxes and assessments upon the premises. *Ibid.*

10. T. being indebted to two sisters and a brother, to secure this indebtedness, caused certain real estate to be conveyed to E. by a deed absolute in form, E. executing a declaration of trust for the benefit of T's sisters and brother which was not acknowledged or recorded. Later at T's request T's sisters and brother executed a writing addressed to E. requesting him to convey the real estate to T. Whereupon E. conveyed the real estate to T. who treated it as his own. *Held*, that the trust was terminated, and that the deed from E. with the previous request in writing signed by the beneficiaries passed to T. a title which was free from equities. *Matthews* v. *Thompson*, 14.

11. Where mortgaged real estate is conveyed to secure certain indebtedness and the grantee executes a declaration of trust, in which the property thus held as security is declared to be subject to the prior mortgages and the payment of the debts to the mortgagees, this does not make the prior mortgagees *cestuis que trust* under the declaration, and their consent is not required to terminate the trust. *Ibid.*

Trust created by bequest for two persons, the income to be paid to them equally during their lives, is terminated as to half of fund by death of one of them, see DEVISE AND LEGACY, 3.

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Agreement between trustee and beneficiaries that trustee shall lend trust fund to firm consisting of himself and sureties on his bond does not terminate his liability as trustee except as changed by this agreement, see LIMITATIONS, STATUTE OF, 2.

Executor with Duties of Trustee.

Where property in hands of executor is subject to certain trusts and no trustee is named, and executor is directed to carry on business of testator, he holds property as trustee on qualifying as executor, and may bring petition for damages for its taking under statutory authority, see EXECUTOR AND ADMINISTRATOR, 5–7.

Trustee also Beneficiary.

For trusts under which trustee is sole beneficiary for life or for term of years, see *ante*, 2; EXECUTOR AND ADMINISTRATOR, 6, 7.

Powers of Trustees.

12. A testatrix, having created a trust for the benefit of her two children, provided as follows: "But upon each of my children attaining the age of twenty-five years, then my trustees or the survivor of them may, if in their or his discretion they or he deem it prudent and advantageous, pay over and convey to the one reaching that age his or her respective share, to vest in him or her absolutely and forever, and my said trustees or the survivor of them shall be the sole judges, and I leave it entirely to their or his discretion to decide whether or not it will be prudent and advantageous for any of my children on his or her reaching that age to receive the principal of his or her respective share." Two trustees were named in the will but neither of them qualified as such and one of them died. A new trustee was appointed who, after one of the children of the testatrix had reached the age of twenty-five years, brought a bill for instructions as to his power to make a partial distribution of the trust estate. *Held*, that the power in question not being limited by its terms to the first trustees vested in the new trustee under R. L. c. 147, §§ 6, 7, and that in his discretion he could pay one half of the entire trust estate to the child of the testatrix who had reached the age of twenty-five years. *Sells* v. *Delgado*, 25.

Duties of Trustee as to Investments.

13. Where a testator gives explicit directions as to the classes of securities in which a trust fund created by his will shall be invested, it is the duty of the trustee to follow the instructions literally. *City Missionary Society* v. *Memorial Church*, 581.

14. A testator, bequeathing $20,000 as a charitable trust, directed that it should be invested in certain classes of securities, and provided that the fund should on no condition be reduced below the amount devised. The net income of the fund was to be expended from year to year towards defraying the expenses of maintaining a minister and public worship.

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Held, that the trustee was not to allow the fund to be reduced below the sum of $20,000 by any intentional act of diversion, but that, if the fund should fall below that amount, the whole of the net income still should be applied to the designated purposes, and no part of it withheld, even when a loss on a certain investment reasonably might be anticipated. *City Missionary Society* v. *Memorial Church*, 531.

Sound Discretion of Trustee as to Investments.

15. There may be circumstances under which an investment in a second mortgage by a trustee is not inconsistent with sound discretion. *Taft* v. *Smith*, 31.

16. A trust small in amount consisted principally of a farm. For the purpose of the trust it became necessary that the farm should be sold and the Probate Court authorized its sale. The trustee sold the farm subject to a first mortgage of $1,300 at a valuation of $4,300, including the first mortgage. The purchaser assumed the first mortgage, paid $1,000 in cash, and gave his note for the balance of $2,000 payable in annual sums of $200 each, secured by a second mortgage on the property. The farm was on the main street of a town and there was no reason to anticipate its decrease in value. By the terms of the trust such portion of the principal as might be necessary might be expended for the support of the *cestui que trust* for life. The purchaser of the farm became insolvent and a sale of the property under the second mortgage, subject to the first mortgage, produced only $800. In a suit against the executor of the trustee for an accounting, it was *held*, that the court could not say that, under the circumstances then existing and acting in the light which he had, the trustee did not exercise a sound discretion in making the loan secured by the second mortgage. *Ibid.*

Liability of Trustee.

17. A trustee, holding the mortgage and note of an insolvent debtor, by agreement with the assignee of the insolvent sold the property, indorsed the amount of the proceeds on the note and filed a claim for the balance against the estate of the debtor in insolvency. The Court of Insolvency rejected the claim for the balance because the sale had been made without the assent of that court. It did not appear that the assignee had any property in his hands belonging to the estate of the insolvent. In a suit against the executor of the trustee for an accounting, it was *held*, that it did not appear that any loss was suffered by the trust from the failure of the trustee to obtain the assent of the Court of Insolvency to the sale. *Taft* v. *Smith*, 31.

Accounts of Trustee.

18. Under Pub. Sts. c. 144, § 9, accounts of a trustee settled in the absence of a person adversely interested and without actual notice to him, where there has been no hearing, may be reopened on the application of such person at the settlement of any subsequent account of the trustee. Section 14 of the same chapter, making a decree allowing the account of a trustee or guardian conclusive except in cases of fraudulent concealment

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or fraudulent misrepresentation on the part of the accountant, relates only to final accounts. *Parker* v. *Boston Safe Deposit & Trust Co.* 393.

Charitable.

Gift to pastor and deacons of church and successors forever for support of church in its religious worship creates public charitable trust, see CHARITY, 1.

In charitable trust providing that trustees shall "suffer and permit" estate to be under "care, custody and management" of certain deacons, legal title only is in trustees, see CHARITY, 2.

Administration Cy Pres.

Devise to two churches as tenants in common ordered to be applied *cy pres* entirely to one of them on discontinuance of other, see CHARITY, 3, 4.

TRUSTEE PROCESS.

Under R. L. c. 189, § 40, which provides that "if the goods, effects and credits in the hands of a person who has been adjudged a trustee are not demanded of him by force of the execution within thirty days after final judgment, they shall be liable to another attachment" or "may be recovered by the defendant," the demand on the execution must be made by an officer, and such a demand made by the plaintiff personally is not sufficient to preserve the rights of the plaintiff or to protect the trustee in paying him. *Barnes* v. *Shelburne Falls Savings Bank*, 574.

UNITED STATES DISTRICT COURT.

Rule of court that attorney of bankrupt shall not act for creditor or for trustee is no defence to suit in equity by trustee to recover assets of bankrupt in which bankrupt's attorney acts for trustee, see BANKRUPTCY, 2.

VENDOR AND PURCHASER.

The rule, that in case of a decree for the specific performance of a contract for the sale of land the vendee is entitled to the profits from the day when the deed was to be delivered and the vendor is entitled to interest on the purchase money from the same date, has no application to a contract for the purchase of real estate and personal property, together with a going business taking it from a date more than seven months before, for a round sum in cash which was paid before the day named for payment. *Holyoke Envelope Co.* v. *United States Envelope Co.* 498.

VOTING CONTEST.

For the purposes of the decision of this case, it was assumed, that a voting contest at a fair for a chattel at ten cents a vote is legal, and also it was

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assumed, that in such a contest the person who turned in the most cash, exclusive of promissory notes, should have been declared the winner. *Fisher* v. *Alsten*, 549.

Candidate in voting contest for chattel where another person is declared winner and symbolical delivery of chattel is made to such other person cannot maintain replevin for chattel, see REPLEVIN.

WAIVER.

Overseers of poor of town can make answer to demand of another town for removal of pauper and therefore can waive right of town to object to notice of demand for insufficiency, see PAUPER, 5.

Answer of town to notice from another town demanding removal of pauper, refusing demand on ground that pauper's settlement is in demanding town, waives right to object to notice for insufficiency, see PAUPER, 4.

Where vendee in contract of conditional sale of furniture removes furniture contrary to provision of contract, sending by vendor of copy of contract to vendee at place to which furniture has been removed can be found to be waiver of rights of vendor to retake furniture under contract on account of removal, see SALE, 7.

Acceptance of payment by owner for land taken under statutory authority is waiver of irregularities in taking, see EMINENT DOMAIN.

One using machine for several months after giving notice of his rejection of it loses right to reject it and recover money paid on account of it, see SALE, 2.

No waiver of limitation in insurance policy of time within which action may be brought, by taking part in interviews and making communications as to policy without referring to limitation, or by refusing on other ground to pay insurance money after expiration of time limited, see INSURANCE, 5, 6.

No waiver by insurance company of requirement of sworn statement of loss by its adjuster going to town where loss occurred and refusing to go to office where he is informed proof of loss is ready, see INSURANCE, 1.

Guarantor by acquiescence in course of business by which holder of guaranty gives up lien for payments guaranteed, may be found to waive right of subrogation to such lien and right to treat release of lien as payment *pro tanto* on guaranty, see SUBROGATION, 3.

WATERCOURSE.

One lawfully using the waters of a stream in maintaining a mill cannot acquire a prescriptive right to have other riparian proprietors farther up the stream continue to maintain reservoirs which they have maintained in the exercise of their right as such proprietors and which incidentally have operated to his advantage in increasing the power at his mill. *Lakeside Manuf. Co.* v. *Worcester*, 552.

Damages for value for purposes of power of waters of brook taken for water

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supply do not include loss of value in parts of property constructed to make right to use water available, and do not include right to use dam or flowage rights over lands of others. On issue of such value of waters, evidence of cost of reproducing dam and of special value of water for washing and scouring is immaterial, see DAMAGES, 2.

For evidence of value for purposes of power of waters of brook taken under statutory authority, see DAMAGES, 3–11.

Purchase of certain land on watercourse subject to restriction as to height of dam does not affect right of purchaser as owner of other land below on stream to construct dam under mill act in connection with such other land, see MILL AND MILL PRIVILEGE, 3.

If city adopts filling placed by mistake by metropolitan park commissioners across branch of river and builds street upon filling it is city's duty to remove filling and construct necessary culvert, see MUNICIPAL CORPORATIONS, 2.

WAY.

Laying out and Construction of Highway.

1. The order of the county commissioners of Norfolk County made in 1844, laying out what was formerly the causeway over Mill Creek in Dorchester as a highway, required only that the road as then existing should be put in proper repair, and does not require that a certain jog about one hundred and nineteen feet long which originally was left unfilled should be included in the highway so as to make it of a uniform width of forty feet, the fact that this was the contemporaneous construction of the order by all who had occasion to work under it and that it remained unquestioned for sixty years being considered of much weight in arriving at this conclusion. *Attorney General* v. *Mayor of Boston*, 209.

2. The owner of land abutting on a highway has no right to require the construction of the highway to the line of his land for convenience of access. *Ibid.*

Alteration of Highway.

3. A petition for damages from the "alteration of" a certain street in a town "by widening, straightening and relocation of the same, for the purpose of granting a location therein" for the tracks of a certain railway company, alleging that on a certain day the county commissioners adjudged "that the common convenience and necessity" required that the street should be "widened, straightened and relocated, as prayed for in said petition", is a petition for damages from an alteration of a highway to be paid by the county under R. L. c. 48, § 1, and not a petition for damages from the mere relocation of a highway which the county commissioners can order to be paid by the town under § 12 of the same chapter. *Livermore* v. *County of Norfolk*, 133.

Repair of Highways.

4. So far as a street is suffered to remain open for travel the duty of the city maintaining it, to take proper precautions to make it safe for trav-

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ellers, extends to the portions of the street occupied by the tracks of a street railway company which is bound by statute to keep the surface of the portions of the street occupied by its tracks in repair. *Hyde* v. *Boston*, 115.

Defect in Highway.

5. A traveller on a bicycle may recover for an injury caused by a defect in a highway of such a character that the city or town would be liable for an injury caused by it to a traveller on foot or on horseback or in any vehicle of the usual kinds. *Spring* v. *Williamstown*, 479.
6. A near-sighted man wearing glasses, riding a bicycle without a lantern on a dark and rainy night, who undertakes to cross a bridge with which he long has been familiar, and which he has had an opportunity of knowing to be unguarded by a rail, without dismounting or slackening his speed, is not necessarily negligent in falling from the bridge into the stream below, and in an action against the town maintaining the bridge, alleging the lack of a guard rail as a defect in the highway, he may go to the jury on the question of his due care. *Ibid.*
7. A deep trench crossing the tracks of a street railway company, dug for the purpose of laying a drain under a permit from the city maintaining the highway, which has been in existence for four or five days and is left unguarded in a portion of the street open to travel, filled with soft mud and looking on the surface like the rest of the street when wet and muddy, can be found to be a defect in the highway. *Hyde* v. *Boston*, 115.
8. A hole five feet square and ten or twelve feet deep, dug between the tracks of a street railway for the purpose of removing earth from a sewer in process of construction, and left unguarded with nothing on the surface to indicate its existence except a small quantity of dirt not far away about nine inches or a foot high, can be found to be a defect in the highway. *Block* v. *Worcester*, 526.
9. If a woman, living in a house which the city has moved back with other houses from the sidewalk under an order for widening the street to make a boulevard, in passing over the unfinished portion of the street between her house and the sidewalk strikes her foot against a board projecting a little above the surface, she cannot recover from the city for injuries thus caused, the city not being liable for a defect within the limits of the highway as located by law but outside the part of the road used and open for public travel. *Lynch* v. *Boston*, 148.
10. If the wrongful or negligent act of a third person contributed to an injury caused by a defect in a highway the city or town is not liable to the person injured, but if the defect is the proximate cause of the injury the fact that the innocent act of a third person contributed to it is no defence. *Block* v. *Worcester*, 526.
11. If a person, who has signalled for a street car to stop, sees the car come almost or quite to a stop, and, believing that it is stopping or has stopped in response to his signal, tries to get on it when it is moving slowly, and, failing to do so, falls into an excavation between the tracks, and sues the city for his injuries as caused by a defect in the highway, and if there is

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evidence tending to show that the conductor and the motorman of the car did not observe the plaintiff's signal or his attempt to get upon the car, and that the car was stopped or made to go slowly because it was passing over the excavation, the plaintiff has the right to go to the jury upon his contention that the accident was not caused by the negligence of the street railway company. *Block* v. *Worcester*, 526.

As to due care of one walking around obstruction in street and falling into mud hole between tracks of street railway company, see NEGLIGENCE, 3.

As to liability of street railway company to traveller falling between its tracks into trench filled or partly filled with soft mud, see STREET RAILWAY, 2.

Pub. Sts. c. 113, §§ 32, 33, requiring street railway company to keep in repair portions of highways "occupied by its tracks," covers rails and space between them and does not include other space occupied by sleepers beneath surface, see STREET RAILWAY, 3.

If city adopts filling placed by mistake by metropolitan park commissioners across branch of river and builds street upon filling, it is city's duty to remove filling and construct necessary culvert, see MUNICIPAL CORPORATIONS, 2.

Where judgment has been recovered against city for injuries from defect in highway caused by contractor acting for Commonwealth, Commonwealth paying judgment is subrogated to rights of city against contractor, but cannot include in such subrogation counsel fees paid by Commonwealth to city solicitor, see SUBROGATION, 1, 2.

WIDOW.

Widow cannot have dower unless she waives provisions for her in husband's will, or unless they were in addition to dower, see DOWER, 1.

WILL.

Will proved in domicil of testator in foreign country is to be construed by law of that country, see CONFLICT OF LAWS.

For construction of wills, see DEVISE AND LEGACY, 1–9; TRUST, 2–4, 7–9, 12; CHARITY, 1–4.

WITNESS.

Cross-examination.

1. The extent to which a witness may be cross-examined as to collateral matters for the purpose of testing his accuracy and understanding is largely within the discretion of the presiding judge. In this case that discretion was exercised rightly. *Burnside* v. *Everett*, 4.

2. Where a witness is asked on cross-examination whether he did not make a certain statement in testifying in another court and answers "I don't know. I may have", the words "I may have" do not necessarily or even probably mean that his best recollection is that he so testified, and the

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answer properly may be understood to be a statement that the witness does not know and has no recollection about his former testimony. *Higgins* v. *Shepard*, 57.

Where judge limits each party to seven expert witnesses and petitioner has examined his seven, he may not extract expert opinion on cross-examination of witness called by respondent not as an expert, see PRACTICE, CIVIL, 8.

Questions to Expert.

Expert witness may be allowed to state his opinion assuming that undisputed evidence is true, see EVIDENCE, 8, 9.

WORCESTER.

Under St. 1867, c. 106, before enactment of St. 1886, c. 331, there was no liability of city to mill owner injured by pollution of waters of Blackstone River, see MUNICIPAL CORPORATIONS, 4.

St. 1886, c. 331, establishing system of sewage disposal for that city imposes public duty in interest of general public and therefore city is not liable for negligence in constructing system, see MUNICIPAL CORPORATIONS, 5.

For various rulings as to damages caused by taking waters of Kettle Brook as additional water supply under St. 1895, c. 384, see DAMAGES, 2–11.

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"Die without issue." See *Gilkie* v. *Marsh*, 336, 338.
"Either." See *Aldrich* v. *Bay State Construction Co.* 489, 492.
"Equity of redemption." See *Clark* v. *Seagraves*, 430, 436.
"Household furniture." See *Glidden* v. *Nason*, 140, 141.
"I may have." See *Higgins* v. *Shepard*, 57, 58.
"May." See *Hampden Trust Co.* v. *Leary*, 577, 581.
"Mortgaged estate." See *Clark* v. *Seagraves*, 430, 436.
"Notice." See *Parker* v. *Boston Safe Deposit, etc. Co.* 393, 396.
"Person aggrieved." See *Leyland* v. *Leyland*, 420, 423.
"Surviving children." See *Lawrence* v. *Phillips*, 320, 322.
"Take." See *Aldrich* v. *Bay State Construction Co.* 489, 492.
"Tracks." See *Boston* v. *Boston Elevated Railway*, 274.

WRIT OF ENTRY.

See REAL ACTION.

WRIT OF ERROR.

Proper remedy of one sentenced to imprisonment for misdemeanor upon default when asking for trial, see HABEAS CORPUS, 2.

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